[fol. 550]

DEFENDANTS' EXHIBIT NO. 2 TO ANSWERS, ETC.

(See opposite) ☞

Uniform Express Receipt AIR EXPRESS

COLLECT

NON-NEGOTIABLE

AIR EXPRESS

division of RAILWAY EXPRESS AGENCY

(AES 17)
9-58
Printed in U.S.A.

Destination: Sacramento Calif.
Via Final Airport
Consignee: Mel S. Robt. ... 4-06-61
Receipt Number
Street Address
Declared Value: Nothing
Forwarding Office: (2445-D) Miami, Fla. 42 440
Via First Airport
Pieces: 1 Article: Package Nature of Contents: Accessories Actual Weight: 17
Air — SCALE LBS.
Orig. Dest.
Dimensions
Dimensional Weight
Number
Shipper: George Harres
Class: Rail Air
Address of Shipper: 5731 NW 7 St.
Point Fast

SHIPPER'S RECEIPT
Collect
Air Express

RAIL CHARGES	AIR CHARGES
Advances	Advances
Value Charge To Airport	Air Value Charge
Rail Exp. Chgs. To Airport	Air Express Charge
Value Charge From Airport	Total Air Charges
Rail Exp. and Other Chgs. From Airport	Total Rail and Air
Total Rail Charges	Tax
	C. O. D.
	C. O. D. Service Charges
	Total to Collect

NOTE—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

ATTENTION OF SHIPPER. The terms and conditions of the air express receipt under which this shipment is accepted are printed on the back hereof.

Received shipment described hereon, subject to the Classifications and Tariffs in effect on the date hereof, value herein declared by Shipper to be that entered in space hereon reading "Declared Value," which the Company agrees to carry upon the terms and conditions printed hereon, to which the Shipper agrees and as evidence thereof accepts this receipt.

Per: [signature] the Company
Number Pieces: 1
Date: 4/4/61
A.M. / P.M.

RAILWAY EXPRESS AGENCY, INC. — AIR EXPRESS

UNIFORM RECEIPT—NON-NEGO[illegible] TERMS AND CONDITIONS

The provisions of this receipt shall inure to the benefit of an[illegible] [illegible]g upon the consignor, the consignee, and all carriers handling [illegible]ent, and shall apply to any reconsignment, or return thereof.

2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

3. Unless caused by its own negligence or that of its agents, the company shall not be liable for—

a. Difference in weight or quantity caused by shrinkage, leakage, or evaporation.

b. The death, injury, or escape of live freight.

c. Loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

4. Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage, or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice therein.

c. Improper or insufficient packing, securing, or addressing.

d. The act of God, public enemies, authority of law, quarantine, riots, strikes, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. shipments.

f. Delivery under instructions of consignor or consignee at stations where there is no agent of the company after such shipments have been left at such stations.

5. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

6. When consigned to a place at which the express company has no office, shipments must be marked with the name of the express station at which delivery will be accepted or be marked with forwarding directions if to go beyond the express company's line by a carrier other than an express company. If not so marked shipments will be refused.

7. As conditions precedent to recovery claims must be made in writing [illegible]

given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof.

[illegible] any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the company may at its option return the property to the consignor.

9. Free delivery will not be made at points where the company maintains no delivery service, at points where delivery service is maintained free delivery will not be made at addresses beyond the established and published delivery limits.

Special Additional Provisions as to Shipments Forwarded by Vessel from the United States to Places in Foreign Countries.

10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, ladings, laws, regulations, and customs of oversea and foreign carriers, custodians, and governments, their employees and agents.

11. The company shall not be liable for any loss, damage, or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs. Claims for loss, damage or delay must be made in writing to the carrier at the port of export or to the carrier issuing this receipt within nine months after delivery of the property at said port or in case of failure to make such delivery then within nine months and fifteen days after date of shipment; and claims so made against said delivering or issuing carrier shall be deemed to have been made against any carrier which may be liable hereunder. Suits shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof. Where claims are not so made, and/or suits are not instituted thereon in accordance with the foregoing provisions, the carrier shall not be liable.

12. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign governmental or customs duties, taxes, or charges, may be stopped in transit at foreign ports, [illegible] or depositories, and there held pending examination, assessments, and payments, and such duties and charges, when advanced by the company, shall become a lien on the property.

Special Additional Provisions as to Air Service.

13. The company will not accept for transportation in air service any single shipment the declared value of which is more than [illegible] [illegible]

14. [illegible]

[fol. 552]

DEFENDANTS' EXHIBIT NO. 3 TO ANSWERS, ETC.

South Florida Growers As[illegible]ion, Inc.

HAROLD E. KENDALL, Mgr.

GOULDS, FLORIDA

Phones Homestead 1830
Miami 82-2216

P. O. Box 468

LIMES - AVOCADOS - MANGOS

International Fertilizers - Crate Material - Growers Supplies

Customer's Order No. _____ Date Nov. 12 1938

M Cash

Address _____

SOLD BY	CASH	C. O. D.	CHARGE	ON ACCT.	RDSE. RETD.	PAID OUT	

QUAN.	DESCRIPTION	PRICE	AMOUNT	
1	Flat Avo. 16		2	25
	Paid			

ALL claims and returned goods MUST be accompanied by this bill.

D 4786 Rec'd by _____

S. L. DONSELLS SERVICES, MIAMI 42, FLA.

[fol. 553]

DEFENDANTS' EXHIBIT NO. 4 TO ANSWERS, ETC.

(See opposite) ☞

Uniform Express Receipt AIR EXPRESS

COLLECT
NON-NEGOTIABLE

AIR EXPRESS

AIR EXPRESS

division of RAILWAY EXPRESS AGENCY

(AES 17)
3-58
Printed in U.S.A.

Destination City: Sacramento Calif. | Via Final Airport:

Consignee: Mr. A. Robert Ulfigal | Receipt Number: 73-94-06 | Date Shipped: Nov 12 1958 | Hour: 6 P.M.

Shipper: Dept of Agriculture | Declared Value:

Forwarding Agent: Bureau of Fruit & Veg Standardization | Via First Airport:

(2445-D) Miami, Fla. RZ 440

Pieces	Articles	Nature of Contents	Actual Weight	SCALE NOS.	
1	Crate Avocados		18	Actual	26
				Gross	Dest.
				Dimensional Weight	Entered by

Shipper: Hoppe Norris

Address of Shipper at Final Point of Origin: 531 N.W. 2 St.

Charges: Paid / Air | Paid in Part

SHIPPER'S RECEIPT
Collect
Air Express

RAIL CHARGES	AIR CHARGES
Advances	Advances
Value Charge To Airport	Air Value Charge
Rail Exp. Chgs. To Airport	Air Express Charges 21 60
Value Charge From Airport	Total Air Charges
Rail Exp. and Other Chgs. From Airport	Total Rail and Air
Total Rail Charges	Tax
	C. O. D.
	C. O. D. Service Charge
	Total to Collect 21 60

NOTE—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

ATTENTION OF SHIPPER. The terms and conditions of the air express receipt under which this shipment is accepted are printed on the back hereof.

Received shipment described hereon, subject to the Classifications and Tariffs in effect on the date hereof, value herein declared by Shipper to be that entered in space hereon reading "Declared Value," which the Company agrees to carry upon the terms and conditions printed hereon, to which the Shipper agrees and as evidence thereof accepts this receipt.

Agent's Signature: J. H. Whitehead | Number Pieces: 1 | Date: 11/12 1958 | Hour: 8 A.M. P.M.

Agent Completing

DEFENDANTS' EXHIBIT NO. 4 TO ANSWERS, ETC.

[fol. 553]

RAILWAY EXPRESS AGENCY, INC. — AIR EXPRESS

UNIFORM RECEIPT—NON-NEGO

1. The provisions of this receipt shall inure to the benefit of and b[inding] upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof.

2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

3. Unless caused by its own negligence or that of its agents, the company shall not be liable for—

a. Difference in weight or quantity caused by shrinkage, leakage, or evaporation.

b. The death, injury, or escape of live freight.

c. Loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

4. Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage, or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice therein.

c. Improper or insufficient packing, securing, or addressing.

d. The act of God, public enemies, authority of law, quarantine, riots, strikes, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. shipments.

f. Delivery under instructions of consignor to consignee at stations where there is no agent of the company after such shipments have been left at such stations.

5. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

6. When consigned to a place at which the express company has no office, shipments must be marked with the name of the express station at which delivery will be accepted or be marked with forwarding directions if to go beyond the express company's line by carrier other than an express company. If not so marked shipments will be refused.

7. As conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within nine months after delivery of the property or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; suits shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof. Unless claims are so made and suits are instituted thereon in accordance with the foregoing provisions, no carrier shall be liable, and such claims will not be entertained.

8. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the company may at its option return the property to the consignor.

9. Free delivery will not be made at points where the company maintains no delivery service, at points where delivery service is maintained free delivery will not be made at addresses beyond the established and published delivery limits.

Special Additional Provisions as to Shipments Forwarded by Vessel from the United States to Places in Foreign Countries.

10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, ladings, laws, regulations, and customs of oversea and foreign carriers, custodians, and governments, their employees and agents.

11. The company shall not be liable for any loss, damage, or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs. Claims for loss, damage or delay must be made in writing to the carrier at the port of export or to the carrier issuing this receipt within nine months after delivery of the property at said port or in case of failure to make such delivery then within nine months and fifteen days after date of shipment; and claims so made against said delivering or issuing carrier shall be deemed to have been made against any carrier which may be liable hereunder. Suits shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof. Where claims are not so made, and/or suits are not instituted thereon in accordance with the foregoing provisions, the carrier shall not be liable.

12. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign governmental or customs duties, taxes, or charges, may be stopped in transit at foreign ports, frontiers or depositories, and there held pending examination, assessments, and payments, and such duties and charges, when advanced by the company, shall become a lien on the property.

Special Additional Provisions as to Air Service.

13. The company will not accept for transportation in air service any single shipment the declared value of which is more than $25,000.00, explosives, articles of an inflammable nature, acids, or live freight, except to the extent otherwise permitted by its tariffs, published and filed with regulatory Boards and Commissions.

14. Fragile articles liable to damage from shock will not be accepted in Air Service.

[fol. 555] [File endorsement omitted]

DEFENDANTS' EXHIBIT "C"

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC. and SOUTH FLORIDA GROWERS ASSOCIATION, INC., plaintiffs,

vs.

WILLIAM E. WARNE, Director of the Department of Agriculture of the State of California, et al., defendants.

ANSWERS OF FRED PIOWATY, SECRETARY OF FLORIDA LIME AND AVOCADO GROWERS, INC., TO DEFENDANTS' INTERROGATORIES —Filed October 10, 1960

Interrogatory No. 1: What was the net worth of Florida Lime and Avocado Growers, Inc. as of March 31, 1958?
Answer: $101,203.55.

Interrogatory No. 2: What was the net worth of Florida Lime and Avocado Growers, Inc. as of March 31, 1959?
Answer: $101,051.74.

Interrogatory No. 3: What was the net worth of Florida Lime and Avocado Growers, Inc. as of March 31, 1960?
Answer: $91,322.19.

Interrogatory No. 4: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1958?
Answer: $723,649.67.

Interrogatory No. 5: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1959?
Answer: $336,214.10.

[fol. 556] *Interrogatory No. 6*: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1960?
Answer: $715,667.68.

Interrogatory No. 7: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1958?
Answer: $209,958.09.

Interrogatory No. 8: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1959?
Answer: $80,428.08.

Interrogatory No. 9: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados during the fiscal year ending March 31, 1960?
Answer: $247,599.22.

Interrogatory No. 10: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados in California during the fiscal year ending March 31, 1958?
Answer: $16,893.34.

Interrogatory No. 11: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados in California during the fiscal year ending March 31, 1959?
Answer: Zero.

Interrogatory No. 12: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados in California during the fiscal year ending March 31, 1960?
Answer: Zero.

/s/ Fred Piowaty
Secretary of Florida Lime and Avocado Growers, Inc.

[fol. 557] *Duly sworn to by Fred Piowaty, jurat omitted in printing.*

[fol. 558]

DEFENDANTS' EXHIBIT "D"

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC. and SOUTH FLORIDA GROWERS ASSOCIATION, INC., plaintiffs,

vs.

WILLIAM E. WARNE, Director of the Department of Agriculture of the State of California, et al., defendants.

ANSWERS OF HAROLD E. KENDALL, PRESIDENT OF SOUTH FLORIDA GROWERS ASSOCIATION, INC., TO DEFENDANTS' INTERROGATORIES—Filed October 10, 1962

Interrogatory No. 1: What was the net worth of South Florida Growers Association, Inc., as of March 31, 1958, for the fiscal year March 31, 1957 to March 31, 1958?
Answer: $20,614.16.

Interrogatory No. 2: What was the net worth of South Florida Growers Association, Inc., as of March 31, 1959, for the fiscal year March 31, 1958 to March 31, 1959?
Answer: $34,810.57.

Interrogatory No. 3: What was the net worth of South Florida Growers Association, Inc., as of March 31, 1960, for the fiscal year March 31, 1959 to March 31, 1960?
Answer: $42,661.27.

Interrogatory No. 4: What were the gross receipts of South Florida Growers Association, Inc., from all business during the fiscal year ending March 31, 1958?
Answer: $1,293,445.68.

[fol. 559] *Interrogatory No. 5*: What were the gross receipts of South Florida Growers Association, Inc., from all business during the fiscal year ending March 31, 1959?
Answer: $708,850.61.

Interrogatory No. 6: What were the gross receipts of South Florida Growers Association, Inc., from all business during the fiscal year ending March 31, 1960?
Answer: $994,421.41.

Interrogatory No. 7: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados during the fiscal year ending March 31, 1958?
Answer: $974,201.75.

Interrogatory No. 8: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados during the fiscal year ending March 31, 1959?
Answer: $524,514.55.

Interrogatory No. 9: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados during the fiscal year ending March 31, 1960?
Answer: $581,288.21.

Interrogatory No. 10: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados in California during the fiscal year ending March 31, 1958?
Answer: $12,973.78.

Interrogatory No. 11: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados in California during the fiscal year ending March 31, 1959?
Answer: —0—.

Interrogatory No. 12: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados in California during the fiscal year ending March 31, 1960?
Answer: —0—.

/s/ HAROLD E. KENDALL
President of South Florida
Growers Association, Inc.

[fol. 560] *Duly sworn to by Harold E. Kendall. Jurat omitted in printing.*

[fol. 561] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., plaintiffs,

vs.

WILLIAM E. WARNE, Director of the Department of Agriculture of the State of California, et al., defendants.

MOTION OF PLAINTIFFS FOR LEAVE TO SUBSTITUTE JAMES T. RALPH AS DEFENDANT IN PLACE OF WILLIAM E. WARNE—Filed January 27, 1961

To James T. Ralph, Director of the Department of Agriculture of the State of California, and to Stanley Mosk, Attorney General, and John Fourt, Deputy Attorney General, attorneys for defendants:

Please take notice that the plaintiffs herein have filed a motion for leave to amend and supplement their complaint by substituting James T. Ralph, Director of the Department of Agriculture, as a party defendant in this action in place of William E. Warne, his predecessor in said office, on the ground that such substitution of defendants is needed in order to obtain a final adjudication of the questions involved (said William E. Warne having resigned as director and vacated the office as of the close of business on January 2, 1961 and said James T. Ralph having succeeded to the office on January 3, 1961). The plaintiffs waive oral hearing on this motion and consent to presentation of the motion to the court at any time prior to trial of the case.

January 25, 1961.

Isaac E. Ferguson, Attorney for plaintiffs.

Copy of motion, proposed order and proposed amendment mailed to attorneys for defendants, also James T. Ralph, January 25, 1961—Isaac E. Ferguson.

[fol. 584]

APPENDIX "B" TO TRIAL BRIEF

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

STIPULATION RE PLAINTIFF CORPORATIONS—
Filed February 1, 1961

IT IS HEREBY STIPULATED between the parties hereto, through their counsel of record, that the plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956, and that it is not in arrears in the payment of its capital stock tax; and that the plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953, and is current in its payment of capital stock tax.

Dated: September 29, 1960.

/s/ ISAAC E. FERGUSON
Attorney for Plaintiffs

STANLEY MOSK, Attorney General
JOHN FOURT, Deputy Attorney General

By .....
Attorneys for Defendants

Exhibit A

[fol. 585] APPENDIX "C" TO TRIAL BRIEF

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

STIPULATION RE EXHIBITS—Filed February 1, 1961

IT IS HEREBY STIPULATED by and between the parties hereto, through their counsel of record, that the following listed documents may be introduced into evidence as defendants' exhibits without further proof of authenticity:

Document	*Exhibit*
1. Cash receipt #D-4786, South Florida Growers Association, Inc., dated November 12, 1958.	Defendants' Exhibit No. 1
2. Air express receipt #73-94-06, dated November 12, 1958.	Defendants' Exhibit No. 2
[fol. 586]	
3. Cash receipt #4897, South Florida Growers Association, Inc., dated December 4, 1958.	Defendants' Exhibit No. 3
4. Air express receipt #74-06-61, dated December 4, 1958.	Defendants' Exhibit No. 4

Dated: August 19, 1960.

STANLEY MOSK, Attorney General
of the State of California
JOHN FOURT, Deputy Attorney General

By /s/ JOHN FOURT
Attorneys for Defendants

/s/ ISAAC E. FERGUSON
Attorneys for Plaintiffs

[fol. 587] Affidavit of Service by Mail (omitted in printing).

[fol. 588] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

MOTION OF PLAINTIFFS FOR LEAVE TO SUBSTITUTE CHARLES PAUL AS DEFENDANT IN PLACE OF WILLIAM E. WARNE—
Filed February 6, 1961

To Charles Paul, Director of the Department of Agriculture, and Stanley Mosk, Attorney General; and John Fourt, Deputy Attorney General, attorney for defendants:

Please take notice that on Tuesday, February 7, 1961, upon the call of the above-entitled case for trial, plaintiffs will move the court for leave to amend and supplement their complaint by substituting Charles Paul, Director of the Department of Agriculture, as a party defendant in this action in place of William E. Warne, former Director of the Department of Agriculture, on the ground that there is substantial need for continuing this action against said Charles Paul, who took office as Director of the Department of Agriculture on February 1, 1961, in order to obtain a final adjudication of the questions involved, such substitution of parties to be without prejudice to the proceedings already had in the action.

February 3, 1961.

Isaac E. Ferguson, attorney for plaintiffs

[fol. 1]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Before:

HON. HOMER T. BONE, Circuit Judge, HON. LOUIS E. GOODMAN, District Judge, HON. SHERRILL HALBERT, District Judge.

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., Plaintiffs,

vs.

WILLIAM E. WARNE, Director of Agriculture of the State of California, et al., Defendant.

Sacramento, California

REPORTER'S TRANSCRIPT OF HEARING (PARTIAL)—
February 7, 1961

APPEARANCES:

For the Plaintiffs:

Isaac E. Ferguson, Esq., 13016 Victory Boulevard, North Hollywood, California.

For the Defendants:

John Fourt, Esq., Deputy Atty. Gen. and Lawrence E. Doxsee, Esq., Deputy Atty. Gen. Library and Courts Building, Sacramento, California.

William A. Norris, Esq., (Tuttle, Tuttle & Taylor) 711 Equitable Life Building, 411 West Fifth Street, Los Angeles, California.

[fol. 1a] Reporter's Note: Opening statements of Counsel and discussion between Court and Counsel preliminary to taking of testimony was reported but by stipulation is not incorporated in this transcript.)

[fol. 2] Tuesday, February 7, 1961

PAUL LOUIS HARDING, called as a witness on behalf of Plaintiffs, Sworn:

The Clerk: Your name, please?
The Witness: Paul Louis Harding.
Mr. Ferguson: State your residence, Dr. Harding?
The Witness: My residence is Orlando, Florida.

Direct examination.

By Mr. Ferguson:

Q. Is that the place of your employment also?

A. I have charge of the U. S. Horticultural Field Station at Orlando and also the Agriculture Marketing Service Station at Miami, Florida.

Q. And you have stated before that you are an employee or officer of the United States Department of Agriculture?

A. I am an employee of the Department of Agriculture, yes.

Q. How long have you been employed by the Department of Agriculture?

A. I have been with the Department of Agriculture since 1930.

Q. Preceding that what was your training for the work with the Department of Agriculture?

A. I was raised in Utah. I received a B.S. degree from the Brigham University. I attended graduate work at the [fol. 3] University of Utah, graduate work at Utah State Agricultural College, and in 1930 I received a Doctor of Philosophy degree from Iowa State College.

Q. What were your special subjects?

A. My special subjects were horticultural plant physiology and plant chemistry.

Q. Then right after that you entered Government employ?

A. In 1930 I received an appointment to the U. S. Department of Agriculture, yes, in Washington, D. C.

Q. What positions have you held in the Department of Agriculture, and what have been your duties?

A. Before going with the Department of Agriculture I was on the staff of Iowa State College in the horticultural department, and then after entering service with the U. S. Department of Agriculture, and I am referring to my notes, I entered as an assistant horticulturist in 1930, and was promoted to an associate horticulturist in 1934, and to a plant physiologist in 1947, and to principal plant physiologist in 1949, and in 1959 I had the title of Supervisory Plant Physiologist.

Q. And something about the nature of your duties?

A. Well, the nature of my duties, of course, was to supervise the work of my group, which is the agricultural marketing service unit in Florida, including Orlando and Miami.

Q. And what is the nature of the work to which you refer?

[fol. 4] A. At our station we have some twenty-odd line projects. These include work with citrus and other subtropical fruits, which would take in your mangoes and your avocados.

Q. What do you mean by projects?

A. A line project is a line of work which has been approved by the Department of Agriculture. It is a project to which budgetary money is set aside to do that particular work, and the project is carried on and the progress reported to the Department of Agriculture and is incorporated in the report to the secretary as the annual report.

It also carries another meaning. The line project is also—which designates the type of work is submitted to a national advisory committee, and I might point out that this committee is made up of men from all over the United States who represent the various types of products, and they review these projects as to the progress and make recommendations back to the Secretary of Agriculture.

Q. These are research projects that you are referring to?

A. I am referring to research projects.

Q. In 1935 did you receive some special assignment?

A. The citrus industry in Florida requested the Department of Agriculture to do work on this question of maturity of fruits, particularly with the citrus fruits, and I was assigned to Florida. Prior to that time I was stationed in Washington.

[fol. 5] Q. Did Florida then have standardization laws governing citrus fruits?

A. Yes, they had standards governing the shipment of fruit. It was a rather unsatisfactory standard, and the industry felt that if the Department of Agriculture, who was a non-partisan party, would undertake the studies they would be very much appreciative of it, and I was sent to Florida to carry on that work.

Q. Did you conduct such studies for some years?

A. I have not only conducted, but I have continued with that work from 1935 in Florida to the present time.

Q. And what fruits?

A. The first fruit that I undertook, of course, was the principal one, and that was oranges. After completing the work on oranges, which included the period of three or four years of intensive study, I then was given the assignment of grapefruit. That was carried on for a four year period.

Since that time, of course, it has been tangerines, temple oranges, Murcotthoney oranges, tangelos, and at the present time we are working on a specialty fruit known as the Murcotthoney orange.

Q. At some time were avocados added to the list?

A. Yes; prior to 1953 the avocado industry had invited me to appear at their meeting, and we discussed—

Q. Before we reach that, what happened in 1949 with re-
[fol. 6] spect to standards for citrus fruits?

A. Well, in 1949 the Governor of the State of Florida appointed an Advisory Committee to draw standards for citrus fruits. The data that I had accumulated during past years became the basis of this code, and it was incorporated into State Law, and became known as the Citrus Code of 1949.

I happened to be upon that Advisory Committee, and I have been on the Advisory Committee up until the present time.

Q. You say the research data that you had gathered was used in formulating this standard?

A. It was the basic information upon which the citrus code presently is used.

Q. What official recognition, if any, was given to you for that work?

A. Well, during recent years I have received recognition; I have received a merit award from the Department, which carries a cash award, and I have also received from the Secretary of Agriculture Superior Service Awards.

Q. I believe you started to say that in 1953 you turned your attention to Avocados?

A. Well, the industry, knowing that we had worked out rather satisfactory information—

Mr. Fourt: May it please the Court, Counsel is now getting into hearsay.

[fol. 7] Judge Goodman: I think the question calls for a direct answer. Read the question again, please.

(Question read by reporter.)

Judge Goodman: You can answer that yes or no.

A. Yes, in 1953 we did do work on avocados.

Mr. Ferguson:

Q. When and how did this research begin?

A. The industry petitioned the Secretary of Agriculture that we do work on avocados, so during the course of the 1953-54 season we did considerable work at the Orlando station with fruits that were taken from the other parts of the State, the rest of the State.

Mr. Fourt: May it please the Court, may we ask the witness a question to see whether he knew of his own knowledge where the fruit was taken?

Mr. Ferguson: I don't think the witness should be interrupted by counsel with what is in effect cross examination. This witness is here as an expert and we can show his qualifications by his training and experience. That is the only purpose, and it has been done, and now we will go on to ask him what he did about avocados.

Judge Goodman: Well, he didn't get a chance to finish his answer to the question, Counsel.

Mr. Fourt: I apologize, your Honor.

Mr. Ferguson: He is telling us what he did, and how it [fol. 8] came to be done.

Judge Goodman: He wants to know what work you did with avocados.

A. Well, during the 1953-'54 year we ran ripening tests at Orlando on seventeen varieties of fruit coming from 37 different groves, 200 lots of avocados were tested, and an individual study made of over 3000 individual producers as to the maturity, the ripening and the palatability of the fruit.

Mr. Fourt: May it please the Court, may we, for the purposes of our motion, move to strike that portion of his answer referring to the source of the fruit, and ask that we be able to ascertain from the witness if he knew personally where the fruit was picked?

Judge Goodman: Well, you can do that on cross examination.

Mr. Fourt: Thank you, your Honor.

Mr. Ferguson:

Q. Now, was anybody else engaged then in the study of the maturity and quality of Florida avocados?

A. Prior to this time Dr. Harkness has been carrying on—

Q. Is that Dr. Roy L. Harkness?

A. Yes, Dr. Roy Harkness of the Experiment Station at Homestead had been conducting studies on avocados with regard to oil. We—

[fol. 9] Judge Goodman: Well, now, ask him another question.

Mr. Fourt: At this point we enter our objection as the record goes along? I am afraid if we do not, at some later proceeding, if there are no objections it will appear that we waived them.

Judge Goodman: Of course you have the right to.

Mr. Fourt: We move to strike then that portion of the answer referring to what Dr. Harkness did or said he did, unless he knows of his own knowledge.

Mr. Ferguson: All he said was that he was engaged in studies. Dr. Harkness has testified in this case, and his deposition is a part of the record.

Judge Goodman: Is that one of the depositions?

Mr. Ferguson: Yes, a very important deposition.

The Witness: The reason I am bringing this out is the fact—

Judge Goodman: If you are going to have this witness refer to what somebody else did and the testimony is in there—you say his deposition is in evidence.

Mr. Ferguson: I am not going to have him testify to what Dr. Harkness did. I just have one little point here to make, and that is the next question.

Judge Goodman: Well, suppose you ask the next question.

Mr. Ferguson:

Q. Was there any interrelation or cooperation between the work done by you and your associates and the work [fol. 10] done by the University of Florida by Dr. Harkness?

A. The Department of Agriculture has a memorandum of understanding with the University of Florida, which includes the maturity and ripening of avocados, and that has been in force since those early days.

Mr. Fourt: If the Court please, we move that the answer be stricken as not responsive.

Judge Goodman: The answer may go out. He wasn't asked about any understanding. You asked him what he did, Counsel, if I remember correctly. What did you do?

Mr. Ferguson: Yes. I asked you if there was any interrelation or cooperation between you.

A. Yes, there was an interrelation. Samples of fruit that were tested at Orlando were picked by Dr. Harkness, and half of the random samples were sent to Orlando for testing for maturity, as judged by palatability and ripening methods. The other half of the samples were retained by Dr. Harkness for oil determination.

Mr. Fourt: If the Court please, we move to strike that portion of what Dr. Harkness did on the grounds it is inadmissible hearsay. The witness, not being a first hand witness, is not privileged to make the statements.

Mr. Ferguson: All he said was that he gathered some samples from Dr. Harkness. That is all he said.

The Witness: During the course of the year I received [fol. 11] 200 samples from Dr. Harkness.

Mr. Ferguson: That is all he said about Dr. Harkness.

Judge Goodman: I will overrule the objection. Go ahead.

Mr. Fourt: Thank you, your Honor.

Mr. Ferguson:

Q. Doctor, in the 1953-'54 season what facilities and help did you have for the avocado research that you conducted?

A. The reason for conducting the work—

Judge Goodman: Pardon me. Judge Bone probably does not have as much experience as we have on this, but after you have listened to about a thousand expert witnesses you begin to get a little bit impatient when they don't just answer the question but start to make speeches or something. I am not saying that with any discourtesy to you, but try and make your answers brief and answer the questions.

The Witness: I will do that, sir. Would you ask me the question again?

Judge Halbert: Read the question, Mr. Wight.

(Question read by reporter.)

A. I have very fine storage rooms at the Orlando station and all the necessary equipment for conducting laboratory work at that station.

Mr. Ferguson:

Q. Now, you made some statement before in a general way about what you did in respect to Avocados in the 1953-'54 [fol. 12] season. In that connection did you formulate a grading system, a score card for maturity and quality of fruit to be tested?

A. It was necessary to do that before we even started our tests, so I did devise a score card.

Mr. Ferguson:

Q. Now, try to follow Judge Goodman's suggestion.

A. I will do that.

Q. The question calls first of all for a yes or no answer and then your explanation.

A. The answer is yes.

Q. And you have that with you?

A. I have that with me.

Q. Well, we will defer that for a moment. Now, this score card is for what purpose?

A. The score card is really to evaluate the maturity and ripening. In other words, it is based on when fruit is mature or palatable, and when fruit is of high quality.

Q. How is this score made up? Who does it?

A. The score is made up by the taster evaluating the fruit on the basis of whether it is green, and by green it means a grassy, bitter, or unpleasant affer taste, unpalatable, rubbery and too soft texture, and does not meet consumer acceptance.

The second category is unpalatable but still watery, [fol. 13] slightly bitter, slightly unpleasant after taste and rubbery to touch, does not meet consumer acceptance.

The next category is the category of palatability, and then the avocado is rated as smooth, mellow, watery and satisfactory flavor, firm, soft texture, and meets the minimum standards of acceptability.

Prime quality is one of excellence, and by that we mean a smooth, mellow, tasty, rich, nutty, with quality of distinct excellence and buttery texture, and this type of fruit is rated as excellent. In each of these categories the taster was to give a numerical code based on this. For instance the first for green he would rate it from 50 to 59. If it was unpalatable he would rate it as 60 to 69. If it was palatable, in other words, it met minimum standards, he would rate it from 70 to 79. If it was excellent, it was a question of rating it from 80 to 100.

Q. I take it from what you said you first established a panel of tasters?

A. We did have a panel of tasters.

Q. Is the use of a tasting panel standard procedure in research on maturity and quality of fruits in other industries?

A. The tasting panel is a very, very common way evaluating fruits. We have used it in connection with our citrus. It is used throughout the country pretty largely for evaluating quality.

[fol. 14] Q. Doctor, will you please tell the Court just what is meant by "mature" and "immature"?

A. That is a question that food technologists have been working on for many many years. We have defined in our work, and it has received general acceptance, that the term "immature" refers to adolescent fruit, or fruit not fully developed. The taste or flavor is green, grassy, slightly bitter, flat, watery, with an unpleasant after taste. It is unpalatable, with a soft, rubbery texture, frequently the fruit shows shrivel during the period of softening, the flavor and texture of the flesh does not meet minimum standards of acceptability by the consumer. And that is a general horticultural definition of the avocado. It applies in many respects with other fruits.

Fruits that are not palatable are regarded as unsatisfactory and immature.

The question of maturity refers to that stage of development of the fruit that when held under suitable conditions it will soften and ripen to be of acceptable eating quality. The taste or flavor of the edible fruit is smooth, watery, mellow or dry, satisfactory flavor, it is palatable and when ripe is soft to firm, the flavor or texture of the flesh meets or exceeds the minimum standards of acceptability.

Mr. Fourt: May it please the Court, the witness was reading from a document. May I see the document?

[fol. 15] Mr. Ferguson: Certainly.

The Witness: Yes.

Mr. Ferguson: We will offer it.

The Witness: I would like to go on to the next point of this, and then I shall be glad to turn this over.

Judge Goodman: Ordinarily we always allow all counsel to see the notes.

Mr. Ferguson: I have given counsel a copy.

Judge Goodman: I take it these are some definitions that he is reading?

A. The question of prime quality—

Judge Goodman: Wait just a minute, please. What is bothering you, Counsel? Why do you want to see it?

Mr. Fourt: That he is not testifying apparently of his own knowledge, he is reading from another document. This is an improper endeavor to prove secondary evidence.

Judge Goodman: You can examine him as to what the document is that he was using, if you want to do that, now.

Mr. Fourt: Yes. If the Court please, in order to preserve our objection, may we move to strike that portion of the testimony which he was reading from the document?

Judge Goodman: We will reserve ruling on that. Let's find out what the document is. You may examine him on that if you wish.

Mr. Ferguson: The document is his own writing, it is [fol. 16] his own writing.

Judge Goodman: Well, ask him what it is. You develop it.

Mr. Ferguson:

Q. What are you reading from, Dr. Harding?

A. This is a definition that I have devised and that I will publish in our technical bulletins, and I have brought this out in other publications.

Judge Goodman: These are your own notes, then—

A. That is right.

Judge Goodman: —pertaining to the subject?

A. That is right. It appertains to—

Judge Goodman: Well, I just want to know what it is.

The Witness: All right.

Mr. Fourt: Thank you, your Honor.

The Court: Is that satisfactory?

Mr. Fourt: Yes.

A. I would like to explain—

Judge Goodman: Well, I don't think there is any question now.

Mr. Ferguson: Well, I don't know whether he was interrupted or not. Have you finished your definition?

A. I would like to bring out the third one, this is important, it is quite important. This is a question of prime or excellent fruit, and the term "prime quality" refers [fol. 17] to the fully developed stage of development of the fruit and to its prime eating condition. It is that stage of ripeness when the fruit reaches perfection in taste and texture. The taste and flavor is smooth tasting, nutty, buttery and quality of distinct excellence. The consumer acceptance of such fruit would be rated prime or excellent.

Q. Doctor, directly under what division of the United States Department of Agriculture is that research work conducted?

A. My particular branch is known as Horticultural Crops. It is also within the Agricultural Marketing Service of the United States Department of Agriculture.

Q. And do you submit all of your data to other officers in the Department, or to whom do you submit it?

A. All annual reports, all projects are closely correlated with our Beltsbill in the Washington office. In other words, the research center. All the reports are cleared there and approved by top officials, and in the case of publications edited. So our officials do know the progress that is being made in all of the work, and they approve it.

Q. And what records do you keep in your research on avocados in particular, what records are kept?

A. Very, very careful records are maintained.

Judge Goodman: Well, what kind? You see, you are deciding the case for us, Doctor. It is not a question of what you consider your records are, but just answer what kind of records are kept. Can you answer that?

[fol. 18] A. This is a sample of the record book that is kept. I have about a dozen of these on avocados, and this is the type of record book that is kept, with the index showing the varieties and the pages showing the various picking dates. This particular record that I open up at any place

will show the date of picking, the date the fruit was placed in the storage room or the ripening room, it will show the temperature, it will show the date tested, it will show that the fruits are all analyzed as individual fruits. It will show the average weight on arrival, the average weight when it came out of storage, it will show the average loss in weight and it will show the diameters and the palatability. It is a complete record of each individual fruit.

By Mr. Ferguson:

Q. In each test?

A. In each fruit in each test.

Judge Goodman: Mr. Ferguson, I think the Court is interested in getting down to the precise question in this case. It may be interesting to hear about how these records are kept and so forth, but these are all time-consuming matters. If you can get this witness on the stand to give some opinion with respect to the oil content of avocados in relation to California avocados—

Mr. Ferguson: Certainly.

Judge Goodman: I think you have sufficiently qualified him. Why don't you get down to that?

[fol. 19] Mr. Ferguson: Well, this is going further. This is producing records of tests. We will have to go to those records to get to the question of the oil contents in relation to maturity. It cannot be answered in one question. It can only be answered by a volume of data, and I propose to offer some of this material in evidence; but I must qualify it first to show how it came into existence and show what records were kept.

Judge Goodman: Would you object if I asked a few simple questions?

Mr. Ferguson: Not at all. I would welcome it.

By Judge Goodman:

Q. Have you made any study or examination of avocados in Florida with respect to the question of oil content?

A. We have, sir, yes.

Q. What was the nature of those investigations?

Mr. Ferguson: That is what I am asking about.

Judge Goodman: You didn't ask him that.

Mr. Ferguson: I am going to ask him it year by year.

Judge Goodman: I don't think we want to spend that much time on this case here.

Mr. Fourt: Your Honor, may I say this; may I say something?

Judge Goodman: We are not interested in a long technical explanation of every step that this witness took in the matter. What we want to find out is after his inves- [fol. 20] gation what has he got to say as a result of his investigation upon this question of the oil content of avocados, which I presume is why you put him on the stand.

Mr. Ferguson: Well, that is, of course, correct, but it isn't the whole story. We show that as a result of studies finally regulations were made by the Secretary of Agriculture, which would have no meaning unless the Court knew the basis. We will show that those regulations are of their nature regulations which will result in the marketing of mature fruit of proper quality. It cannot be shown in one sentence. I want to say this, your Honor.

Judge Goodman: Well, all right, let's get on with the evidence.

Mr. Ferguson: I beg the indulgence of the Court. I want to make a proper record in this case. This case is important. It has decided already a jurisdictional question which was never before decided by the Supreme Court of the United States. The case is even more important because it is a case of vital importance under the Commerce clause of the Constitution of the United States. I submit, your Honor, it cannot be answered in one question.

I think I should have the right to make the kind of record that I think is necessary to present the Plaintiff's case.

I am not taking a long time. I will be through with this witness in not too great a time and give him the opportunity [fol. 21] to show this research, and then your Honors can see that alongside of the regulations, and how they came to be made and what they represent, and what is the effect of the regulations. And then on the other side—

Judge Halbert: Mr. Ferguson, might we just say a word or two, please?

Mr. Ferguson: I beg your pardon.

Judge Halbert: Mr. Ferguson, if this regulation has been promulgated by the Federal Government, isn't it binding upon us? It doesn't make any difference whether it is founded upon sand or upon steel and concrete.

Mr. Ferguson: That is true.

Judge Halbert: Well, why go into all this background, then, if that is binding upon us?

Mr. Ferguson: Because your Honor must understand the nature of the regulations in order to determine whether there is any merit in this defense that the standard imposed by California is comparable with the standard imposed by the National Government.

Now, if I say so, that isn't enough. If I say so that is not enough, but I assure, your Honor, that the body of evidence that we will produce through this witness will well satisfy the Court on the basic question of this case.

Judge Bone: Mr. Ferguson, is there a contention in this case of any sort that this Federal regulation involved here, Order 60—is that the number—was made and goes outside [fol. 22] the orbit of the statute on which it is grounded?

Mr. Ferguson: A defense was permitted to be filed over my objection which challenged the validity of the regulations made under the statute. I objected to—

Judge Bone: Has the objection been made that the regulation is invalid authorizing the Department to make the regulation?

Mr. Ferguson: Such a defense was included over my objection and I think my objection was good.

Mr. Fourt: We will withdraw that defense, your Honor.

Judge Bone: What is that?

Mr. Fourt: We will withdraw that defense in the Answer.

Judge Bone: In other words, you are not asserting here for California that the regulation goes outside the underlying statute?

Mr. Fourt: No, your Honor.

Judge Bone: That it is authorized by that statute?

Mr. Fourt: That is correct.

Judge Bone: Then the regulation authorized by statute you say is binding on this Court or is not binding, as Judge Halbert suggests.

Mr. Fourt: Yes, it is, and the best evidence of the ... of the regulation is the regulation itself.

Judge Bone: We are thoroughly familiar with the ... eral doctrine that regulations made in course of the Stat... [fol. 23] have the effect of law.

Mr. Fourt: Yes, your Honor.

Judge Bone: Like the regulations of these Federal Cour... under which you gentlemen operate.

Mr. Fourt: Yes, your Honor.

Judge Bone: All right.

Mr. Ferguson: Well, that is out of the way. Now, the... is still to be understood the nature of this regulation, h... it comes to be made, so that your Honors can match ... against what the defendants say is a proper regulation ... be superimposed by the State of California under the poli... power. So you have to look into both standards.

Judge Goodman: Well, you are arguing again now, Mr. Ferguson. Your opponent has just conceded that the Fed... eral regulation is under the authority of a Federal statu... and that it is binding upon this Court. Now if there ... something in that that you want to have your witness ex... plain as to what it means and as to what its effect is, tha... is another question; but I don't think it is necessary for you to engage in a long examination of this witness to sho... all the data that was compiled preparatory to the adoption of this regulation.

Mr. Ferguson: It isn't for that purpose, your Honor. I... is to enlighten the Court about the nature of the regulation so that the Court can understand the nature and effect of [fol. 24] the standard imposed, and then consider the que... tion whether it is consistent with that regulation to let the State of California superimpose a different regulation.

Judge Goodman: There is nobody stopping you fro... doing that.

Mr. Ferguson: That is all I want.

Judge Goodman: You go ahead with this witness.

Mr. Ferguson: I wasn't paying any attention to that de... fense because the law was so clear, as stated by his Honor.

Judge Goodman: All right, go ahead.

Mr. Ferguson: I will not take an undue amount of time, but—

Judge Goodman: Nobody is objecting to your taking the appropriate time to present your case, but you were going into an area that did appear to us to be entirely unnecessary.

Mr. Ferguson: Well, I would like to direct the thought—

Judge Goodman: There is already a regulation of the Federal Government in existence, which your opponent concedes is promulgated pursuant to the authority of the Federal Statute, and it is binding. Now, why don't you go on from there?

Mr. Ferguson: The argument was made this morning that there is—

Judge Goodman: Well, please, let's not argue any more. [fol. 25] Ask the witness more questions.

Mr. Ferguson: I would not argue, but there was an objection made to which I was trying to respond.

Q. You were telling us about your records, and the first record is this book in which you kept a record of the tests?

A. Yes.

Q. And you say you have about a dozen of those, is that right?

A. There is about a dozen books like that.

Q. And then from time to time you and your assistants made summaries of the data, annually or at other times?

A. Some reports, of course, have to be turned in every year, and submitted to the department, to the Secretary of Agriculture, and also to the National Citrus Advisory Committee.

Q. Are they sometimes published?

A. The annual report is more or less confidential, although it is acceptable, copies are given to the Advisory Committee.

Q. Are some of the summaries published?

A. Yes, the summaries are published in both reports.

Q. I will remind you that in 1953 a proposed marketing agreement for Florida avocados was presented to the Secretary of Agriculture:

Mr. Fourt: If the Court please, we will again object to Counsel speaking rather than asking a question. We feel it will be much quicker and acceptable to ask questions.

[fol. 26] Mr. Ferguson: I will ask the question, but there has to be a special way of asking—

Judge Goodman: Counsel, will you please proceed to ask your question?

By Mr. Ferguson:

Q. I call your attention to the fact that the marketing order refers to a hearing, a public hearing to be held in Homestead on March 8th to 11th, 1954. Now, did you participate in that hearing?

A. I participated in that hearing.

Q. In what manner?

A. I presented the information—

Judge Goodman: I will sustain an objection to this as immaterial.

A. I presented the—

Judge Goodman: Just a moment. I will sustain an objection, even though it hasn't been made. This is immaterial. We are not concerned with what this witness did in 1954, participating in any hearing. Now let's get down to the question involved in this case.

Mr. Ferguson: If the Court please—

Judge Goodman: There is no use arguing about it, Counsel. The Court has ruled on it. Ask another question. Please proceed.

By Mr. Ferguson:

Q. Did you—

Judge Goodman: Judge Halbert suggests this might be an appropriate time for all of us to relieve our feelings by [fol. 27] taking a recess for lunch.

Mr. Fourt: May it please the Court, may we renew the suggestion that if this is the type of testimony to be made that they are not going to be able to show a case in equity before the discretionary jurisdictional Court and that the three Judges need not hear this testimony today and tomorrow and tomorrow and tomorrow?

Judge Goodman: Well, I don't think it is going to last that long.

Mr. Fourt: Thank you, your Honor.
Judge Goodman: We will recess until 1:30.

(Thereupon a recess was taken until 1:30 P.M. of this date.)

[fol. 28]

AFTERNOON SESSION

February 7, 1961. 1:30 P.M.

Mr. Fourt: May it please the Court, we have placed on the Clerk's desk and given to counsel a memorandum re substitution. We ask permission to file it with the Court.
Judge Goodman: You may.
Mr. Fourt: Thank you very much.

PAUL LOUIS HARDING, resumed the stand and testified further as follows:

Mr. Ferguson: Will you mark this Plaintiff's Exhibit 23 for identification?
Judge Goodman: What is it? You want an identification number for some document?
Mr. Ferguson: 23.
Judge Goodman: One. It should be one.
Mr. Ferguson: No; we have 22 already. This should be 23.
Judge Goodman: We have no exhibits marked in evidence yet.
Mr. Ferguson: Well, it would conflict with the numbers that appear in the record already. I think it would be more convenient to go on with that number series.
Judge Goodman: These are exhibit numbers of documents in the deposition?
Mr. Ferguson: Yes, your Honor.
[fol. 29] Judge Goodman: I suggest again to you, Counsel, to offer your depositions in evidence, and then we will have a record of them. Don't you want to do that?
Mr. Ferguson: Certainly I do. I just question as to the time as to when.
Judge Goodman: Well, we will make the time right now. Just offer them in evidence, what you want, and then we

can get the next exhibit number. The depositions are all together, are they?

Mr. Fourt: We object, your Honor, and we respectfully ask permission and request they be read in order that we may make objections to the testimony. We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay.

Judge Goodman: We will mark—do you wish to have the depositions marked?

Mr. Ferguson: Yes, your Honor.

Judge Goodman: We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them.

Mr. Fourt: Thank you very much.

Judge Halbert: In other words, all objections will be reserved.

Judge Goodman: All objections will be reserved.

[fol. 30] Mr. Fourt: Yes, your Honor.

Mr. Ferguson: I should like to call the Court's attention to the fact that our last number is 22, so this will be 23.

Judge Goodman: All right, No. 23 for identification is a document you are now offering.

(A document entitled "Score card for testing taste or flavor of avocados" etc. was marked Plaintiff's Exhibit No. 23 for identification.)

By Mr. Ferguson:

Q. Dr. Harding, I show you the folder marked Plaintiff's Exhibit 23 for identification. Will you look at it and see if you have another copy of this folder?

A. I have a copy of that.

Q. Directing your attention to the contents of this folder, page 1, "General information on avocado research, 1953-'54," and page 2, "Varieties and sampling, 1953-'54," and the next page, "Score card for testing taste or flavor of avocados," that you have already read, have you not?

A. I have.

Q. And then a printed article or statement entitled "The relation of maturity to quality in Florida avocados," and

then "Evidence presented at hearing with respect to proposed marketing agreement of Florida avocados, March 8, 1954," and a statement entitled "Maturing, ripening and softening of Florida avocados," on page 9 through 12, and [fol. 31] then a set of exhibits attached to this statement.

A. That is right.

Q. Is this the matter that you presented at the hearing at Homestead on March 8, 1954?

A. In general, yes. The part—there are two separate parts—

Judge Goodman: Counsel, I am going to interrupt you again. Counsel, your opponent once before objected to this. The Court regards this as entirely immaterial and irrelevant. We are not required in a three-Judge Court hearing in which is involved the validity of a State Law to hear all kinds of evidence as you would if you were trying a case before a Jury or an ordinary civil action. Only such evidence as is necessary to determine the question of the invalidity of the statute is all we need to hear.

Mr. Ferguson: That is all—

Judge Goodman: Otherwise you will keep us here, I can tell from your trend, for days and days hearing everything that was done by this witness in the performance of his duties as a representative of the Department of Agriculture in Florida, and we just don't propose to hear that.

If you want to get an opinion from him on a matter that is material to this case, of course, the way is open to do that. We are not going to encumber the record with things like this. So I will sustain the objection that was made to [fol. 32] this exhibit. It may continue to be marked for identification as Exhibit 23.

Mr. Ferguson: I haven't offered it yet.

Judge Goodman: I thought you had.

Mr. Ferguson: I have to lay the foundation for the offer.

Judge Goodman: Well, you asked him whether or not this was material that he used in the presentation.

Mr. Ferguson: That is one question.

Judge Goodman: Well, I sustained the objection.

Mr. Ferguson: Your Honor, may I make a statement by way of supplementary opening statement, and I think that

accounts for the difficulty here, that the nature of this regulation by which maturity of Florida avocados is determined is the setting by the Secretary of Agriculture of dates upon which avocados which have attained a certain weight or size may be picked and shipped.

It is important to the determination of the ultimate question in this case to ascertain that this is a regulation which establishes maturity, and a regulation by the Federal Government which precludes the imposition of a different kind of regulation by a State Government.

It is necessary, your Honor, to have data here as to the relation between these picking dates and oil content so the Court can see that these avocados are mature by compliance with the regulations of the Secretary of Agriculture [fol. 33] without attaining 8 per cent oil content. That is absolutely necessary for us to show.

Judge Goodman: Well, Counsel, can't you ask your witness that question? And if the other side thinks it is not correct they have an opportunity to cross examine. It isn't necessary, once you have qualified an expert that he has to tell every step that he took in connection with the matter. Just have him give his opinion. I have told you that before. That stands then as prima facie evidence until the other side in some manner breaks it down on cross examination.

Mr. Ferguson: I say that there must be before the Court a record which shows that at these picking dates the avocados have not attained the 8 per cent oil content. The witness could not just say that in one sentence to cover all avocados in Florida.

Judge Halbert: You said that in one sentence, Mr. Ferguson. Why can't he say it in one sentence?

Mr. Ferguson: There would be no evidentiary support for his statement. He can only say—

Judge Goodman: Well, Counsel, I am sorry to interrupt you, but I have been twenty years on the District Bench and I have heard experts by the hundreds testify, and it is not necessary, and it is the law in Federal Courts that it is not necessary to do anything more than to just qualify your expert and have him give his opinion, and you don't [fol. 34] have to have him tell, if he is testifying as to value.

all the houses that he looked at or all the rest of the things that he did, because that is unnecessary, unless the other side wants to cross examine him to see if his opinion is any good or not.

Mr. Ferguson: I do not—

Judge Goodman: We are not going to permit it, Counsel, so you might as well make up your mind about it, and not argue about it. You ask the witness what his opinion is. I am sure he won't have any difficulty in expressing his opinion. He is very voluble. You just ask him what his opinion is with respect to the manner in which this is done in Florida, and that is all you have to ask him.

Now please proceed along those lines and don't take up any more of our time on this.

Mr. Ferguson: Well, your Honor, I do wish to identify the documents and to ask the questions which I think qualify them as evidence, and then, of course, I will abide by whatever ruling the Court makes.

Judge Goodman: It wouldn't mean a thing to us, Counsel, unless you have got the opinion of an expert on the thing. Documents are not per se admissible. They are not official records—

Mr. Ferguson: They are official records.

Mr. Goodman: They have not been identified as official records.

[fol. 35] Mr. Ferguson: That is exactly what I want to bring out, your Honor. It would just take two or three questions to do that, to qualify them.

Under both Section 1732 and Section 1733 of the Judicial Code—Section 1733 (b), "Copies or transcripts of any books, records, papers or documents of any department or agency of the United States Government."

Section 1732: "Records made in the regular course of business."

And, of course, there are ample authorities. And these qualify under both sections.

Judge Halbert: Mr. Ferguson, may I ask you a question: What do you propose to prove by Dr. Harding? I don't want a long dissertation, I just want a succinct statement as to what you propose to prove by Dr. Harding.

Mr. Ferguson: I propose to prove that regulations under which these Florida avocados are permitted to be picked and shipped are of their nature and by scientific research established as assurance of maturity and quality, and that the compliance with these regulations and permission to ship pursuant to these regulations is obstructed by the State of California by the imposition of another standard which is foreign to this fruit as a test of maturity.

Judge Halbert: Well, reversing the statement that you made there, I take it that you ask Dr. Harding to give an [fol. 36] expert opinion as to the very thing that we are called upon to decide here, whether or not these regulations do, in truth and in fact, impinge the Constitution.

Mr. Ferguson: Oh, no.

Judge Halbert: But aside from that, going back to the first, why can't we get to that very question? The State's attorney here has withdrawn any claim that there is anything irregular from a legal standpoint so far as this regulation laid down is concerned. Why can't the regulation be produced and why can't Dr. Harding be asked if in his opinion as an expert that is a sound basis for the selecting and shipping of avocados, and then we have got what the issue is about in the matter. But what he did—well, it starts away back in 1935, what he did with oranges, and so forth, and I don't think that that has any bearing at all on the case here.

Mr. Ferguson: That was only done to show that he has had experience in the matter of the establishment of standards on maturity and quality.

Judge Halbert: Well, nobody questions that.

Mr. Ferguson: And we have shown that he has spent years in research on the avocado, the same objective.

Judge Goodman: Well, why can't you show him a Federal regulation and ask him whether the avocado raised in Florida which he has been inspecting and serving all these years, whether or not the avocado there raised and shipped [fol. 37] complies with the Federal regulation and is fit to ship out of Florida? Why can't you ask him that question? Why do you have to ask him anything else?

Mr. Ferguson: May I offer a suggestion to short-cut the examination? I have asked to have marked this folder and

its contents as Plaintiff's Exhibit 23. I will now ask to have marked another folder which summarizes the work done in the next year, 1954-'55, as Plaintiff's Exhibit 24 for identification.

Then, in the next year, 1955-'56, Plaintiff's Exhibit 25 for identification.

Q. There is one more, is there not, Doctor, one for three years together?

Judge Halbert: Mr. Ferguson, aren't you just in effect offering the Congressional Record to establish the fact that a law has been passed by Congress and we haven't any choice in the matter, we have to accept what is produced to us, what the law is?

Mr. Ferguson: If the Court wants to enter a judgment to that effect I would be well satisfied.

Judge Halbert: That is not what I said. In other words, there is a law presented to us here and you want to throw the whole Congressional Record in to show the history and background of the law, to show that it was a just and proper law, and we haven't any choice in the matter.

[fol. 38] (Further argument between Court and Counsel.)

Judge Bone: I want to know what the witness thinks about Florida avocados, whether they are in full compliance with the requirements of this regulation. Now, is there any reason why he shouldn't answer that?

Mr. Ferguson: None whatever.

Judge Bone: I don't want to sit here all this week with a lot of unanswered questions that seem reasonable and rational. I wonder if the witness thinks that that question is entirely out of order?

By Judge Bone:

Q. You can express an expert opinion. Do Florida avocados comply with that regulation? I mean the avocados that are shipped into California?

A. The avocados that are shipped out of the State—of course we don't know where they go to—

Q. But to the best of your knowledge, the avocados that are shipped out?

A. The avocados that are shipped certainly meet the consumer acceptance and are palatable.

Q. Do they comply, in your judgment, with the requirements of that regulation?

A. I think they do comply.

Q. You say you think they do?

A. I say yes.

Q. That is your honest opinion about it?

[fol. 39] A. Yes.

Q. That they comply in full with the terms of that regulation?

A. That is my opinion.

Judge Halbert: Dr. Harding, let me ask you a question based on what you said a moment ago.

Do you mean that these avocados are not required to meet this Federal regulation before they are allowed to go out of there?

A. No, I don't. I mean that they must meet Federal regulations of the Marketing Agreement.

Judge Halbert: That is what Judge Bone asked you and you answered—

A. I didn't understand it that way.

Judge Bone: It may be that I am somewhat crass and crude and barbaric and even uncultured, but I asked you if avocados raised in Florida and shipped out lawfully conform to the requirements of this regulation. Now do you understand that question?

A. Yes.

Judge Bone: I will write it out, I will go out and write it out and make it very simple so even Judges and lawyers can understand it. I realize that maybe we are a little confusing in the way we go at things.

Judge Halbert: Well, that is a fact, isn't it, Dr. Hard-

[fol. 40] ing, that these avocados have to meet this Federal regulation before they can be shipped out?

A. They all have to be inspected and carry a certificate saying that they—

Judge Bone: That isn't the answer I want. Do they conform to the regulation?

A. Yes.

Judge Bone: Just a little three-letter word.

Mr. Ferguson: To comply with the suggestion of the Court, I would like to mark—there is a fourth one, and apparently I haven't got the copy—have them marked for identification and ask two or three questions which I think will qualify them as evidence, and then go on, without going into the contents and detail at this time. There might be a later time when the Court might want to find out about them.

If you will mark these two pages 26, two typewritten pages—

Judge Goodman: What is that, Counsel?

Mr. Ferguson: Two typewritten pages entitled "Resume of Progress Studies of Florida avocado maturity," covering the years 1958-'59, 1959-'60 and 1960-'61.

(The documents referred to were marked Plaintiff's Exhibits 24, 25 and 26 for identification.)

[fol. 41] Mr. Ferguson:

Q. Dr. Harding, let me ask you as to the contents of these folders now marked for identification as Plaintiff's Exhibits 23 and 24, 25, and the two typewritten pages, No. 26. Are these part of the records of the United States Department of Agriculture kept by you in the course of the performance of your duties as an officer of the Department?

A. They are, sir.

Q. With particular reference to the printed reprints taken from the proceedings of the Avocado Horticultural Society, was that submitted in manuscript form which you had prepared?

A. All of the reports that you have there have been submitted and approved.

Q. Including what is printed?

A. Including what is printed.

Mr. Ferguson: Then I would defer the offer of these exhibits at this time, in compliance with the suggestion of the Court.

Judge Goodman: Well, you are just having marked because it is your view that they substantiate the opinion that the witness has given that the Florida avocados comply with the Federal regulations?

Judge Bone: Now what will that exhibit number be?

Judge Goodman: There are four of them, 23, 24 and 25.

Mr. Ferguson: And 26.

[fol. 42] *Judge Bone: Now, we have something that California's Counsel can shoot at, a luminous target. If he fails to hit the bulls-eye I think he is less adroit than I think he is.*

Mr. Ferguson: Look at what is on that table.

Judge Goodman: Do you have any more questions of the witness, Mr. Ferguson?

Mr. Fourt: An inquiry, your Honor: I take it these exhibits are not offered in evidence, they are just marked for identification.

Judge Goodman: They are marked for identification. They haven't been offered yet.

Mr. Ferguson;

Q. Dr. Harding, based on your training, and experience in horticulture and plant physiology and plant chemistry and the research on maturity and quality of Florida avocados, in which you have been engaged since 1953, do you have an opinion whether or not percentage of oil content is a scientifically valid basis for the determination of maturity and quality of Florida avocados?

Mr. Fourt: To which we object that the witness has not been qualified as an expert on oil content. He is a plant physiologist who apparently has been in charge of palatability tasting, and therefore we submit that he is not qualified as an expert to answer this question.

Mr. Ferguson: Palatability tasting is the manner of determining maturity and quality. We have already covered [fol. 43] that.

Judge Goodman: We will overrule the objection on the ground that perhaps it pertains more to the weight of the testimony than the admissibility.

Mr. Ferguson:

Q. Doctor, what is your opinion?

A. We have had a great deal of experience in our laboratories. We have—

Judge Goodman: That is not a statement of your opinion, Doctor. Please give us your opinion.

A. The oil content does not measure—is not directly related to palatability.

Mr. Ferguson:

Q. What do you embrace in the word "palatability"?

A. By "palatability" I mean consumer acceptance, or taste.

Q. And what does that mean as to maturity?

A. When a fruit is mature it is palatable.

Q. Does it embrace maturity?

A. It embraces maturity.

Q. And quality?

A. Yes.

Judge Goodman:

Q. And you say that the oil content is not directly related to the question of maturity?

A. Yes.

Mr. Ferguson:

Q. And what are the reasons?

A. In our tests the oil content varies considerably among [fol. 44] any given lot of avocados picked at any one time, and our tasters have not been able to differentiate or give a preference to the higher oil content or to give a preference to the fruit of low oil content. The individual variations, tasters cannot differentiate that preference.

Judge Goodman:

Q. Is the matter of maturity entirely a matter of tasting?

A. As fruit ripens they increase in palatability, in most cases. They also increase in oil, but within any given period

of picking, where you have a wide range in oil content in every sample, the taster cannot pick out from taste the high oil and the low oil content fruit.

Q. Wouldn't the quantity of oil in fruit have some relation to maturity, just the same as it would in any other, for instance the same as juice would have in the common fruit?

A. Not necessarily, because there are people who do not prefer varieties that are high in oil content, sir.

Judge Halbert:

Q. What is the range in oil content in avocados, Dr. Harding?

A. That is an interesting point that we have dodged around, because of the fact that in Florida we have West Indian varieties, and even when they are very ripe and palatable—

Q. Doctor, I asked you a simple question: What is the range of oil content in avocados? I don't care whether they are in Florida, California, Michigan or South America [fol. 45] or where they are.

A. I would say individual fruits will run anywhere from 1 per cent to 20 per cent.

Q. So that the mean range is from 1 per cent oil content to 20 per cent oil content?

A. In Florida, yes.

Q. No, I am not talking about Florida, I am talking about avocados over all, anywhere. Where would the maximum oil content of avocados be found?

A. I think it would be found in the Mexican type of avocados, and that would run perhaps to 30 per cent oil, or higher perhaps.

Q. Well, I think perhaps I didn't make my first question clear. I meant those avocados that the ordinary person would accept as marketable or palatable, tasty fruit, what would be the minimum of oil content in such an avocado as that? I suppose when they are very green there is very little or no oil content?

A. By "green" you mean immature?

Q. Yes.

A. I started to say that the West Indian varieties are very low on oil content, and they would vary from 3 to 4 or even 5 per cent when they are mature and ripe.

Q. All right. Then is it your statement that the minimum for a ripe avocado would be 3 per cent and the maximum [fol. 46] for a ripe avocado would be 30 per cent?

A. I can't answer the question that way.

Q. Why can't you?

A. Because of varieties which normally don't exceed 3 or 4 per cent. Other varieties go 5 or 6 per cent. Other varieties—

Q. Dr. Harding, I am not talking about varieties, I am talking about an avocado that is ripe, the least amount of oil that you would find in such an avocado, I don't care where it comes from, what kind it is, its size, shape, color or anything else.

A. If you are talking about the minimum I would say that avocados are acceptable and palatable at 2 and 3 per cent as a minimum.

Q. All right. Now, what is the maximum that avocados may contain and still be marketable and palatable?

A. I have only experience in Florida, therefore I can answer your question somewhere around 15 to 20 per cent.

Q. Do I understand then that you do not purport to be an expert on any avocados except those grown in Florida?

A. My experience is with Florida avocados, sir.

Q. Do you or don't you know anything about California avocados?

A. I am familiar with them, yes. I have not run any tests, however.

Q. I am not talking about tests. Doctors have opinions about lots of illnesses that they have never had, and you, [fol. 47] as an expert, I suppose, would have an opinion from your studies rather than actual experience. You said a few moments ago that avocados might have as much as 30 per cent of oil in them. What avocados did you have in mind when you said that?

A. The Mexican type.

Q. Have you actually had this experience or are you telling this from your study?

A. You asked me for my opinion and I base it on the reading I have done.

Q. In other words, it is from your studies as distinguished from actual experience?

A. That is right.

Q. So that we have a minimum range of from two to three per cent in certain avocados that come from the West Indies, did I understand you to say?

A. That is right, sir.

Q. To a maximum around 30 per cent for avocados that come from Mexico?

A. That is right.

Q. So Florida and California are probably in between somewhere, or do you have an opinion on that?

A. Yes, I have an opinion, because our early varieties are the West Indies. This is followed by the hybrid types which are West Indian and Guatemalan types, and then we [fol. 48] have a few straight Guatemalan varieties. We do not raise any commercial lots of the Mexican type.

Judge Bone:

Q. What does a Florida variety derive from, Doctor?

A. I didn't hear the question, sir?

Q. What does the Florida variety derive from? What sort of ancestor did it have?

A. A number of our summer varieties are all West Indian varieties.

Q. That would include the Florida variety?

A. Yes. Of course, there is no variety by that time, but the West Indian varieties are summer varieties.

Q. That is the type that flourishes in that particular area of the earth?

A. They do require a warmer temperature, and so far as I know they are not grown commercially on any scale in California, sir.

Judge Halbert:

Q. What is the maximum amount of oil that you find in the Florida varieties?

A. You are referring now to the West Indian?

Q. No, the ones that are grown in Florida?

A. Sir, our varieties range all the way from the West Indians to the Guatemalan type. We have two races and hybrids between these, and the range, as I said before, would range at minimum palatability somewhere around [fol. 49] 3 per cent up to 20 per cent. You can plainly see that this question of oil is quite an interesting one, because certain varieties are known for their low oil content, and that is the reason I am saying that in any given lot a taster that is tasting a given variety of avocado, 20 avocados, and they may range in oil from 2 to 5 per cent and yet the taster cannot differentiate and show a preference for the 5 per cent over the 3 per cent.

Mr. Ferguson:

Q. Dr. Harding, when you answered His Honor's first question about the over-all range of oil content, you disregarded varieties to start with. Now, approximately how many varieties of avocados are grown commercially in Florida?

A. We have in the Marketing Agreement over 40 varieties of avocados.

Q. How do you express the maturity standard in short form?

A. In short form the maturity standard is based on given picking dates for a variety in conjunction with weight and diameter.

Mr. Fourt: If the Court please, may we move to strike the answer? The best evidence of the regulation would be the regulation itself.

Judge Goodman: Did you put this in terms of the regulation? Would you read the answer?

(Answer read by reporter.)

[fol. 50] Mr. Ferguson: He didn't say anything about regulations.

Mr. Fourt: We understood he was referring to the regulation, and apologize.

Mr. Ferguson:

Q. It is a picking date or set picking date for each variety?

A. Picking date and a given minimum weight and diameter, or diameter for each variety.

Q. That would be a picking date according to the attainment of certain weight or size?

A. Yes, and these picking dates and minimum weights are based on palatability or taste.

Q. Now, which are leading avocados of the West Indian race?

A. Waldin and Pollock.

Mr. Fourt: If the Court please, we respectfully suggest that the witness has not been qualified as a marketing expert. His qualification is as a plant physiologist, and now he is being asked regarding the prominent varieties raised in Florida.

Judge Goodman: Well, he may have that knowledge as a result of his work. Overruled. Did he answer already?

Mr. Ferguson:

Q. You have named the Waldin and Pollock.

A. The two leading ones.

Q. Do those varieties ever attain 8 per cent oil content?

A. Very seldom.

Q. Does the Pollock ever attain that?

[fol. 51] A. Very seldom.

Q. And I should qualify it: Is there a time element?

A. There is another question that enters into it, and that is if the West Indian varieties are left on the trees very long they fall. The become over-mature and they fall.

Q. Were you talking about oil content at the time of picking date?

A. Picking date and maturity.

Q. Picking date and maturity is synonymous, is that right?

A. In connection with weights and diameters.

Q. Now which are leading hybrids, West Indian, Guatemalan, and Hybrids?

A. Perhaps Lula and Booth 8, Booth 7.

Judge Bone:

Q. Doctor, what is the desirable length of time between the picking and marketing? How much in spread in time is desirable to market a good avocado?

A. Well, the West Indian kind, the stay on the tree is very short. I would say the maximum length of picking is perhaps two months, two months and a half at the most. In the case of the hybrid types, and the Guatemalan types, they will stay on the trees very, very much longer, and the marketing period is at least three months, between three and four months.

Q. In other words, you have a period of three or four months in which you can market the product after it is picked?

[fol. 52] A. Oh, no.

Q. That is what I am getting at?

A. Oh, no.

Q. When you pick the fruit off a tree, or wherever they grow, what period can elapse before that fruit becomes spoiled or unsalable?

A. Well, there again I have to call to your attention the West Indian types, probably from the time they are very hard and picked until they are overripe or oversize would probably not be—would be perhaps 10 days at maximum.

Q. That means you have to move that fruit and get it on the market and sold, if possible, within a period of 10 days?

A. Yes, sir, that is right.

Now in the case of the latest varieties of the hybrids that we speak of, perhaps you would have 15 days, but that would be about all. It takes about 7 or 8 days to fully soften an avocado if it is held at fairly high temperature.

Q. I assume it is something not comparable to, but something like a banana. I have seen a train load of bananas that arrived off a ship green, but they are ripened by hanging them up and letting them turn yellow?

A. The avocado fits pretty much in the same category.

Q. In other words, it is the same sort of an animal as the banana?

A. Very much so.

[fol. 53] Q. It matures after it is picked?

A. It softens after it is picked.

Q. Is that a sort of maturing process?

A. An immature or very immature fruit may soften or become rubbery, and it may shrivel, may not even soften at all.

Q. I am intrigued by this word "mature" and "maturity". What does that spell out? If you pick the avocado, but you want ten days for marketing, or two weeks for marketing, what occurs in that period inside the fruit?

A. That is an interesting thing, and we have gone into that rather fully, sir. We have followed the sugar content, we have followed the phenolic compound, which are the bitter or the astringent—

Q. Well, is that a change, the avocado undergoes what you call the maturing?

A. Softening. Some would refer to it as "maturing", but we would refer to it as "softening." And during that time the oil content changes very, very little.

Q. We are going to hear something here about maturity. I would like to know what counsel means by using that expression. It might help some. Does the term "maturity" refer more to the time when the fruit is picked? In other words, if you pick the fruit before it is ready to be softened it would be green in the ordinary sense of the word, and it might not soften and be palatable, and it might, as you say, [fol. 54] shrivel up or otherwise not become a good fruit?

A. Of course, using it in the horticultural sense you are using it correctly. The fruit has to be matured, and it will ripen and develop flavor afterwards; but in some fruits it is as ripe as it ever will be when it is picked. For instance, the orange, it doesn't increase in sugar after it is picked.

Judge Goodman: We are referring only to avocados.

A. Yes. So far as we know the changes that take place are very minute in the case of the avocado other than the enzymitin that develops flavor in the avocado.

Judge Goodman: We will take a five minute recess.

(Recess.)

Mr. Ferguson:

Q. Doctor, you were asked by his Honor to explain more fully the meaning of maturity. Is there a definition in the quality standards?

A. Yes, there is a definition, and—

Q. What page are you looking at?

A. I am looking at page 25.

Mr. Fourt: To which I object, your Honor. Now I believe he is quoting from the regulation. The regulation is the best evidence.

Mr. Ferguson: Wait a minute. This is an exhibit attached to the Complaint, and it is admitted by the Answer and he is simply reading from an exhibit.

[fol. 55] Judge Goodman: Well, we don't have to have him read it. We can read it as well as he can. But what is the question?

Mr. Ferguson: The question is the definition of the word "mature".

Judge Goodman: Does the regulation define it?

Mr. Ferguson: Yes, your Honor.

Judge Goodman: Well then, we can read it. You can call our attention to it.

Mr. Ferguson: Well, I thought his Honor wanted to ask some more questions about it. It is all right with me, either way.

Judge Bone: If you think it is clearly defined in the regulation we can read it.

Mr. Ferguson: I wouldn't know if it is clear. If he reads it and your Honor thinks it is clear—I would rather your Honor judge for yourself whether it is clear and complete. Here is an opportunity to ask this witness.

Judge Bone: Well, there has been a suggestion that the avocado has reached some form of maturity when it is picked, but then it undergoes a certain change like the banana does. It is green when it is picked, and a full grown banana, but it changes its texture and sweetness develops in the body of the banana and the pulp of the banana so that you like to eat it. Now he says that this change in the avocado is somewhat akin in that sort of process to the avocado.

Would you agree with that?

[fol. 56] A. Yes.

Judge Bone: We are not trying to draw a deadly parallel between the two, but it is some sort of process as that that occurs in the avocado.

Mr. Ferguson: In Florida.

Judge Bone: And it would be in the California avocado also, for all I know.

Mr. Ferguson: Oh, yes.

Judge Bone: Well, I guess we have that ironed out.

Judge Goodman: Do you have any other questions?

Mr. Ferguson: Just one more question, Doctor? In these picking dates, aside for the different varieties—I believe you have them here for 45 varieties—do they take any regard whatever of oil content?

Mr. Fourt: To which we object, your Honor. The regulations speak for themselves again. I believe counsel is referring to the Federal regulations.

Mr. Ferguson: They speak for themselves so far as they speak, but I am asking if they include any consideration of oil content?

Judge Goodman: If they do what?

Mr. Ferguson: If they include any consideration of oil content.

Judge Goodman: The regulations, of course, speak for themselves, what they say. If you are asking that sort of a [fol. 57] question that calls for his interpretation of the regulations.

Mr. Ferguson: No, it is not an interpretation, it is a fact.

Judge Goodman: Well, restate your question again, will you, please?

Mr. Ferguson: With the reporter's help.

Judge Goodman: All right, we will have the reporter read it.

(Question read by reporter.)

Judge Goodman: Does who take any regard?

Mr. Ferguson: The dates, the picking dates.

Judge Goodman: It is not very clear. Maybe the witness understands it.

Mr. Ferguson:

Q. Are they to any extent at all based on oil content?

Mr. Fourt: To which we object, that calls for an opinion of the witness and the regulation is the best evidence of the intent of the regulation.

Mr. Ferguson: Here is a witness who has to do with the formulation of these regulations, the adoption of the regulations, and he has done so over the years.

Judge Goodman: I think the witness has already testified —I may be wrong—that there was no change in oil content after the picking date. Isn't that right?

Mr. Ferguson: That wasn't this question.

[fol. 58] Judge Goodman: That is what you said, wasn't it?

A. Sir, let me answer the question. In the Florida regulations—

Judge Goodman: No, I don't want to know about the Florida regulations, we can read that.

A. All right.

Judge Goodman: What we are interested in is your opinion as to the facts. Is there any change in the oil content in the Florida avocado after the picking date, change in oil content?

A. After the fruit is picked there is practically no change in oil content.

Judge Goodman: So the fruit is not picked until it has reached a stage of maturity in which there is already an oil content in the avocado, is that right?

A. The oil content does not change after it is picked.

Judge Goodman: So there is oil in it at the time it is picked?

A. That is right.

Judge Goodman: But the important thing is to pick it at the right time?

A. That is right, sir.

Mr. Ferguson:

Q. Is the time in any way related to oil content?

Mr. Fourt: To which we object—

[fol. 59] Mr. Ferguson:

Q. The picking date.

Mr. Fourt: To which we object. I believe the question again refers to regulations, and the regulation is the best evidence.

Mr. Ferguson: Everything is about the regulations, but the question is what is the nature of the regulation, what is the basis of it?

Judge Goodman: I think he has already answered that question.

Mr. Ferguson: But your Honor's question was a different one, and I am glad you put it; but this is a question whether in the fixing of the picking date any consideration is given to oil content as well as weight and size.

Judge Goodman: You may answer that.

A. No.

Judge Halbert:

Q. Dr. Harding, I have been reading this definition of "mature" here, and it seems to me that it is a philosophical exposition on the subject rather than a yardstick by which one may gauge it. It says, "Mature means that the avocado has reached the stage of growth which will assure a proper conclusion of the ripening process."

A. That is right, sir. I can explain it with other fruits.

Q. All it says is that an avocado which is mature is mature, isn't that what it says?

A. That is right, sir, but in the case of a banana, which [fol. 60] was brought up a little while ago, and in the case of the apple, the fruit contains starch, and during this softening process the starch is changed over to sugar, and therefore the ripening process that you are referring to there is a very radical change. In the case of the avocado the oil content does not increase. In the case of the citrus fruit

the sugar content does not increase. The processes are going on there. The fruit must be mature when it is picked to be acceptable. It doesn't ripen or develop to any degree of quality after it is picked.

Q. Well, what gauge or formula or rule do you have which determines when the ripening process in the avocado is completed?

A. The only means we had was to start in before the fruit was mature, when the fruit which shriveled and would develop poor flavor, and follow it through the season until you reached that point where it would soften to a satisfactory quality.

Q. That isn't the point. I am a stranger and I come down to Florida, and I want to know when there is a completion of the ripening process in an avocado. How do I determine that?

A. Sir, all you have got to do is go to a store and buy an avocado, because they have to meet these regulations, and they would be mature.

Q. You are just talking around in circles now, Doctor. [fol. 61] A. No.

Q. I am talking about—if I want to buy an avocado from a farmer and he says, "Well, go on out there and pick yourself an avocado that has completed its ripening process." How would I do that?

A. I would think that you would have a most difficult time, sir. You might pick a large fruit which was a very late fruit, and you would find it did not ripen or soften satisfactorily, and therefore you would not be happy.

Q. Well, in other words, this definition of mature in here doesn't mean a thing, does it?

A. It means this: That a knowledge must be obtained of the variety in order to pick the fruit at a mature stage.

Q. Dr. Harding, are you telling me that a variety of fruit is like hatching a chicken, that you can depend on approximately 21 days after the hen starts setting on them that there is going to be a chicken come out of the egg or the egg is going to be spoiled?

A. No. But when you have many varieties and they cover a wide range of different kinds, it is most difficult to pick an avocado and know that it will be mature, be-

cause of the type. You have these West Indians, you have the hybrid types, and all these varieties in between, and a knowledge of the varieties, and when they mature, is very important.

Q. But the only yardstick that is laid down in these regu-
[fol. 62] lations that I see is that they must be of certain weight and a certain diameter, and they must be picked between certain dates?

A. That is right, sir.

Q. But it doesn't say that, it doesn't say that; it says that they can't be shipped before a certain date?

A. That is right.

Q. You can pick them any old time you want to as long as you don't ship them before that date.

Judge Goodman: What page are you looking at?

Judge Halbert: I am looking at page 24.

Mr. Ferguson: Your Honor, may I ask a question? Are those words used in the regulations, "picking," and "shipping"?

A. The import of them, yes.

Q. Actually aren't they shipped the same day they are picked?

A. I would think very nearly the same time.

Judge Halbert:

Q. Dr. Harding, you said you had some considerable experience with oranges. Don't you determine when your orange can be picked by the sugar content?

A. Not by the sugar content alone, sir. There is the sugar content, the acid content, the volume of juice, the rind color. There are a number of factors, and all are interwoven, and in order to meet a standard it must be more than one thing, it must be all of them.

[fol. 63] Q. All right. Then I will accept your amendment. But you have have got something that you can put your finger on, that there must be a certain amount of sugar, the orange has to be a certain percentage color, and so forth?

A. Yes.

Q. Well now where, in this regulation, is there anything that even approaches that kind of definition?

A. Sir, I might remind you that in the case of the apple is a good indication like that. Usually it is the number of days from bloom to maturity. In the case of the canteloupe it may be a pressure test, or in the case of apples and pears it is a pressure test. There are a number of ways of judging maturity. This is really a measure of growth, because we are talking about weight, weight of the fruit. So it is really a matter of growth.

By Mr. Ferguson:

Q. I don't think, Doctor, you have got his Honor's question. Let me ask you this: Are these dates fixed in any permanent way, or are they from season to season?

A. There is a certain amount of flexibility, of course, with any marketing agreement. It allows the growers, the shippers, the handlers who are members of this Association, to regulate under the powers of the Department, providing the Secretary approves—it gives them a certain amount of flexibility, which would take into consideration the seasonal [fol. 64] conditions.

By Judge Halbert:

Q. Wait. Now, Doctor, you are getting right back to what I was concerned about here. I, myself, grew up on a farm, and nobody is going to tell me that you can pick oranges on a certain day every year, or you can pick apples on a certain day every year, or you can pick canteloupes on a certain day every year, because it just doesn't happen that way, does it? The average season, it may fluctuate for a great number of days, depending on the season, can it not?

A. There you have brought out a very fine point with the Marketing Agreement. It puts the control, sir, of regulations into the hands of the growers, the handlers, the shippers, and yet having to abide by certain regulations, so that they can't be influenced too greatly by economic conditions. These regulations have to be approved by the

Secretary. They can take in changes as seasons permit. It isn't iron clad.

Q. Well, then, what good are these regulations?

A. They must be approved by the Department of Agriculture, sir.

Q. In other words, the law is all right, except if you get the Secretary of Agiculture to approve it you can violate the law, is that it?

A. No, you cannot violate the law. First of all, the men who are selected I would say are among the very finest type [fol. 65] of men, because they are representatives of the community—

Q. I am familiar with all those things, those marketing committees. As I say, I was born and raised on a farm, and I know that they try to get that kind of people, but the fact remains that what this schedule B says here can be fluctuated by the conditions of a particular year and the conditions that exist that need to be fluctuated to beat the situation?

A. It has a certain flexibility, yes.

Q. All right. Now then one last question and I will be quiet: Is there any reason why the oil content of avocados cannot be used as a yardstick by which to test the marketability of avocados?

A. Sir, I have been testing oil content at our Miami station for the last three years, and the report that you have here is an abstract of that work. The one point I did call your attention to, our tasters could not differentiate high oil from low oil.

Q. I don't care whether the tasters can or not. Is there some reason why the oil content cannot be used as a yardstick the same as the sugar contents is used for the testing of oranges?

A. I suppose you could if you had—say we had 45 varieties, sir, I suppose you could have maybe 30 different oil standards rather than a single one to regulate the whole group.

[fol. 66] Q. That is the very thing I was turning over in my mind here. Maybe the only thing that is wrong is that the thing is too rigid. But can you give me any reason, Doctor, why the oil content could not be used as a yardstick if it was not too inflexible?

A. The first thing I would want to do is to have it related to palatability. That would be one. I would want to have a non-destructive test, if possible, although that would not be essential.

It would mean when you reached the border line, sir, and we will say that we are setting a border line of 4 per cent for Waldin variety, and you say the oil content shall be 4 per cent, let me point out that when you say 4 per cent you have 50 per cent of the individual fruit above 4 per cent, you have 50 per cent of the individual fruit below 4 per cent, you are either saying that those below are not mature and should not be picked, and if they are picked then what are you going to do about them?

Q. What do you do with your oranges that are picked below the sugar content?

A. Sir, the regulations require that they be destroyed.

Q. Well, what is the difference between an orange and an avocado?

A. There wouldn't be any difference sir. The only thing is that the price per piece is quite different.

[fol. 67] By Mr. Ferguson:

Q. It would result that certain varieties would all be destroyed?

A. If you set a single standard, sir, and you set the standard at 8 per cent, it would mean that all those varieties that do not measure up to 50 per cent, it is putting those people out of business. Not only that, but you are saying that they are not edible, and yet as you look over the country, in the Caribbean section these varieties are the livelihood of those people.

Q. I think in his Honor's questions about the fixing of the dates that one more thing needs to be answered: Are these dates fixed for more than one crop year at a time?

A. They are made for one season only.

Q. So that when they are fixed you have behind you the experience of prior years and you take into account the weather, the weather conditions, growing conditions are the same, is that right?

A. That is the flexibility of the marketing agreement, sir.

Q. And the flexibility is that if conditions develop within any season there may be amendments, is that right?

A. Yes.

By Judge Bone:

Q. Counsel, you have been referring to regulations, and I used that expression myself. There are two documents involved here. One here appears on page 19 of this exhibit. That is published in the Federal Register. It was effective [fol. 68] June 11, 1954, and in exhibit A of your Complaint there is a document printed in this exhibit, here, this deposition, appearing on page 35, which is Order 69, Administrative Committee Rules and Regulations.

The word "Committee" bothers me a little.

Now I don't know just what it means. Which of these is or are the regulations with which we are here concerned, and to which I intended to refer this morning?

Mr. Ferguson: At page 19 is the general order establishing the market agreement. That is the marketing agreement. There are no regulations—

Q. Well, when I asked the question whether or not these California avocados met the requirements of the regulations what was I referring to, the document appearing on page 19 or the document on page 25?

Mr. Ferguson: On 24 is a sample of what is called a Maturity regulation. It is a summarized statement of the regulations in effect during that season.

Q. Which of these printed documents—

Mr. Ferguson: That is the regulation.

By Judge Bone:

Q. —is or are the regulations that we are talking about here?

Mr. Ferguson: There are two sets of regulations. "B" on page 24 is a maturity regulation. "C" on page 25 is a quality regulation.

[fol. 69] Judge Bone: Are we to say to ourselves here in disposing of this case that Exhibits A, B and C constitute the regulations we have been discussing here?

Mr. Ferguson: "A" is broader than that. "A" is the entire order of the Secretary and it lays the basis for the

regulations, how they should be made, how they should be obeyed. Then you go on and from season to season you make the regulations. The maturity regulations are made over again year by year. The quality regulations, the grades established, are not changed so often; but the exhibit on page 25, "C", is the first grading regulation.

I will offer at a subsequent time whatever is subsequent, both as to the maturity regulations and as to grade regulations, and we will offer them by way of judicial notice from the Federal Register.

Judge Bone: I had no opportunity to see these.

Judge Goodman: You don't have to offer any of these, just ask for judicial notice.

Mr. Ferguson: Just ask for that, and I will supply copies for judicial notice.

Now for the purpose of including them in cross examination, if need be, by counsel for the Defendants, I would like to make an offer of the exhibits identified as Plaintiff's Exhibits 23, 24, 25 and 26.

Judge Goodwin: We will reserve the ruling on that.

[fol. 70] Mr. Ferguson: If Counsel wishes to cross examine he would know that they are offered.

Judge Goodman: We will reserve the ruling on that. Does that conclude your direct examination?

Mr. Ferguson: Yes.

Cross examination.

By Mr. Fourt:

Q. Doctor, is there a season of maturity on the varieties of avocados grown in Florida?

A. Usually they are classified as Summer varieties—

Q. No, a season of maturity.

A. A time of maturity, do you mean by that?

Q. Yes. Is there a period of time in the growing of each variety of avocados when the avocado, when picked, will then develop into a soft, flavorable avocado?

A. Yes.

Q. A moment ago you mentioned that you had read literature in the field. Have you read the publication,

Avocado Production in Florida, by A. L. Stahl(?) in April, 1942?

A. Yes, I know him very well, sir.

Q. Do you consider him a reliable authority?

A. He did work on avocados many years ago, sir.

Q. Is the Booth 7 variety a popular commercial variety of avocado in Florida?

A. I think it ranks about fourth or fifth.

[fol. 71] Q. Would you agree that the statement of Mr. Stahl that the oil content during the period of maturity for the Booth 7 is from 10 to 14 per cent?

A. In our experience we haven't tested them that high.

Q. Is the Booth 8 a popular commercial variety in Florida?

A. It would rank maybe fourth or fifth.

Q. Would you agree with the statement of Dr. Stahl that the oil content of the Booth 8 variety during the period of maturity is 8 to 12 per cent?

A. I would not agree with that statement, sir.

Q. Is the Lula variety a popular commercial variety of avocado?

A. The Lula avocado is the leading variety.

Q. Would you agree with the statement of Dr. Stahl that during the period of maturity the Lula avocado has an oil content of 12 to 15 per cent?

A. The Lula avocado as we have tested it during the period of maturity and palatability does not run that high.

Judge Goodman:

Q. How high?

A. The Lula avocado, when it is acceptable to be shipped, runs about 6 to 7 per cent, sir. May I just inform the Court—

Judge Goodman: Please, wait for the next question.

Mr. Fourt:

Q. Doctor, you mentioned that there were West Indian varieties in Florida, and you mentioned that their period [fol. 72] of time after picking before they become soft was shorter than for the hybrid variety?

A. Yes.

Q. How do you account for this shortness of period?

A. I can't account for it except the varietal differences. I can point that out in many other types of fruit.

Q. Are the West Indian varieties more difficult to market than the hybrid varieties?

A. What do you mean by more difficult?

Q. Do you understand what I mean by the term "shelf life" in avocados?

A. Yes.

Q. What do you mean by "shelf life"?

A. "Shelf life" is usually referred to as the period in which the fruit is held at the retail level.

Q. Is the shelf life of the West Indian variety shorter than the hybrid variety?

A. It usually is.

Q. And is this of some importance to the retailer?

A. It could be, yes.

Q. In what respect would it be important?

A. It would mean that he would have to move his avocados faster or at least take more precautions and not leave them out on the shelf; put them in the refrigerator.

Q. Do you know a Margaret J. Mustard, a permanent employee assigned to the University of Miami?

[fol. 73] A. Personally, yes.

Q. Are you acquainted with her research paper, The Effect of Cold Storage on Florida Produce?

A. I am familiar with it, sir.

Q. Do you agree with her conclusions—is there a condition called "Internal browning in avocados"?

A. There is, sir.

Q. Would you describe that?

A. I would rather discuss it under a more popular term, "Chilling Injury". Chilling injury is where the avocado or where the banana turns black in the refrigerator. It is a condition in which the fruit is held at too low a temperature and will not soften or ripen properly. The tomato is a very fine example of that. Tomatoes held below 50 degrees won't ripen with acceptable quality.

Q. Are the West Indian varieties of avocados more susceptible to chilling injury than the hybrid varieties?

A. We have done testing on each, but we are not ready to draw a conclusion. I would say that there are varietal differences. I wouldn't limit it to the West Indian race. Perhaps you better bring out the fact that we—

Judge Goodman: Please, please. You do your job, which is to testify, and let the attorney do his job of asking the questions.

By Mr. Fourt:

Q. Would you agree with the statement of Margaret [fol. 74] J. Mustard that, quote "The Waldin variety of avocado is highly susceptible to internal browning"?

A. Again I will say that we are doing that type of work and I would not like to confine it to the Waldin or any one race yet.

Q. Would you agree as to this particular variety, the Waldin?

A. No, I would not agree yet.

Q. Is the variety Trapp a West Indian variety?

A. Yes.

Q. Would you agree with the statement of Margaret J. Mustard that, quote "This variety, like the Waldin, is highly susceptible to internal browning"?

A. Again I would like to answer the question but you are referring to chilling injury, and I would not like to confine it to any one variety or race.

Q. Is it true that Florida avocados when shipped outside the state are usually shipped under refrigeration?

A. Yes, usually.

Q. And would such fruit then be susceptible to the danger of having chilling damage?

A. Not necessarily. It all depends on what temperature you are going to hold them at, sir.

Q. But that adds to the risk of the shipper, does it not, that they would be susceptible?

[fol. 75] A. As it would apply to bananas too, sir.

Q. Yes.

By Judge Bone:

Q. Maybe we ought to clear up one thing: When we speak of refrigeration, do you mean shipped out in reefer cars and frozen, or what do you mean by that question, Counsel?

Mr. Fourt: Yes.

Q. How are avocados shipped out of Florida, by what means?

A. Largely by trucks.

Q. And what type of cooling devices are used in those trucks?

A. There are two types of cooling devices. One is straight ventilation, in which there is no refrigeration used at all. The vents are open, and the ventilation is used, and during the winter season that is the type of refrigeration or type of cooling that is used. During warm weather trucks are equipped with refrigerating units and these are set automatically at a certain temperature and maintained.

By Judge Bone:

Q. Is that dry ice?

A. No, mechanical.

By Mr. Fourt:

Q. Is the danger of damage to Florida avocados through chilling injury increased by the amount of the increase in distance that the avocados are to be shipped?

A. I would say that chilling injury would be more related to the temperature than it would be to length of time. And [fol. 76] you can see the reason for my answer: If you held the temperature at 60 degrees, which would be a refrigerant temperature, then time would not be a factor. If you held them at 40 degrees, why, then, temperature would be the most evident.

Q. Doctor, would you agree with this statement of Dr. Stahl in the Changes in Composition of Florida Avocados in Relation to Maturity, in May, 1933, quote—have you read this document?

A. What year was that?

Q. 1933.

A. 1933?

Q. Yes.

A. Yes, I know the publication.

Q. Quote, "The fat and oil of the avocado, of course, is its chief constituent other than water, and when it has reached its maximum there is no doubt that the fruit is mature."

Would you agree with that statement?

A. There wouldn't be any question there, because when it reaches its maximum, why, that would be even overripe, sir.

Q. Would you agree with this statement, quote "That fat content seems to be the best indication of maturity of the avocado. This can be very readily correlated with the maturity of the fruit"?

A. I wouldn't agree with that statement, sir.

Q. Would you say, then, that there is a difference of [fol. 77] opinion between yourself and Mr. Stahl?

A. I would say on that point there is a very definite reason for change of opinion.

Q. Turning to the palatability testing of your station, did you have any personal knowledge of the person who picked that fruit? That is, were you there when it was picked?

A. In some instances, yes.

Q. Were you there in 5 per cent of the instances when it was picked?

A. No, I was not, sir.

Q. Do you have any personal knoweldge of the source of the fruit except for those occasions when you were there when it was picked?

A. I have visited every source from which our fruit has been picked.

Q. Were you there when the fruit was picked?

A. I have been there when the fruit was picked, but not on every occasion.

Q. Not more than 5 per cent of the cases?

A. That is right, sir.

Q. Was the name of the variety of fruit identified on the shipment when it arrived at Orlando?

A. Every lot of fruit was identified by this means: That each sample was placed in the bag separately and labeled separately, so each bag of fruit was identified as to variety [fol. 78] and source.

Q. It was identified then from the package or shipment from which it came?

A. No, I am not saying that. I said each lot of fruit. There may be five or six lots of fruit in one package.

Q. Now, with the exception of these few occasions when you were present when the fruit was picked you have no personal knowledge of the date when this fruit was picked?

A. The date when they were picked?

Q. Yes. No personal knowledge of the date when the fruit was picked?

A. I would have to depend entirely upon the correspondence.

Q. Who were the members of your tasting panel to whom you delivered samples of avocados?

A. At our Orlando station?

Q. Yes.

A. I could give you some names.

Q. Would you just describe who they were?

A. Yes, they were members of our station staff: Mr. Winston, Mr. Sunday, Mr. Cubbedge, Miss Dudak, Mrs. Welty, Miss Parker, Mr. Williams, Mr. Meckstroth and Mr. Forrest.

Q. Had they received any training as to their duties and obligations as tasters?

A. We have been testing fruit over a period of 25 years. These are staff members who while not expert yet know [fol. 79] how to evaluate fruit, so I would classify them as fairly good tasters.

Q. Do you know where their homes were? Were their homes in Orlando?

A. As you know, Government people come from all parts of the Country, and while they made their home there, most of them have a background quite different. I could go into any one of their backgrounds if you would like me to.

Q. Yes. Were there any individuals from New England?

A. Yes.

Q. From the deep south?

A. Yes.

Q. From California?

A. At the present time, yes.

Q. No, when these tests were made you discussed before?

A. I am of the opinion that none came from California.

Q. Now was your purpose of these taste tests to ascertain consumer acceptance of the samples submitted to them?

A. That is right, sir.

Q. And is it true then that these persons then were to represent the consuming public in the United States?

A. That was the idea.

Q. And how many persons did you utilize as tasters?

A. In these panels in the earlier work somewhere around ten tasters were used.

[fol. 80] Q. Doctor, are there a number of variables in Florida avocados that would influence the size of the fruit?

A. Yes, I would think there would be.

Q. Would horticultural practice affect the size of the fruit?

A. I would be inclined to suppose so.

Q. And is it possible then that there could be a large adolescent fruit which in fact yet would be immature?

A. Very much so. That is the reason we call attention to varieties, sir.

Q. And is it true that the maturity of fruit of two trees side by side might vary considerably?

A. That is right. They would vary to some extent.

Q. And did you find any consistency that the large fruit would be more palatable than the small fruit?

A. That is right, sir. Of a given variety.

Mr. Fourt: May it please the Court, I have not seen the exhibits here that have been marked for identification, except the first one, but it consisted of apparently statements made in testify, it consists of pamphlets written in the Florida State Horticultural Society, it consists of—usually these are research papers, apparently written by Dr. Harding. We suggest that these papers are inadmissible hearsay; that the witness is here, and that Counsel should ask anything that he wishes Dr. Harding to present at this time rather than in the form of a research paper.

[fol. 81] Judge Goodman: You are renewing your objection, then?

Mr. Fourt: Yes. And of course we also feel that they are irrelevant.

Judge Goodman: Are you finished with your cross examination?

Mr. Fourt: Yes.

Judge Goodman: Any redirect, Counsel?

Redirect examination.

By Mr. Ferguson:

Q. Doctor, you were asked whether there was a season of maturity for Florida avocados. Is there a single season for all varieties of Florida avocados?

A. No, indeed not.

Q. Are there maturity seasons for each variety?

A. That is what characterizes a variety, is the shape of the fruit and the time of ripening.

Q. You were asked about your staff of tasters. You have members on your staff who assist you in the picking of fruit, and the making of oil tests?

A. Would you ask that question again, please?

Q. Do you have—have you had assistants who participated with you in the making of oil tests?

A. Oh, yes. I have a fairly large staff.

Q. Will you tell us who these assistants have been and what are their qualifications?

A. I would be very happy to.

[fol. 82] During the year 1954-'55 Dr. Mortimer J. Soule, who took his A.B. degree, I believe, from the University of Florida, his Master's—no, from Cornell; his Master's degree from the University of Miami in Horticulture; his Doctor of Philosophy degree from Florida State University—that is the University of Florida at Gainesville.

Mr. Nelson has his B.S. degree from Florida.

Dr. Hatton, who is presently at the Miami station, took his degree at the University of Washington, his Doctor's degree.

Judge Halbert: Wait a minute, maybe I am lost here. What is the relation of these people to the testimony here?

A. These are staff members who assisted me in making these tests.

Judge Halbert: What kind of tests? What kind of tests are we talking about?

Mr. Ferguson: The question was asked on cross examination.

Judge Halbert: I know, but what kind of tests are we talking about?

Mr. Ferguson: I said oil tests, maturity tests, which includes—

By Judge Halbert:

Q. Maturity tests?

A. Yes.

Q. What kind of maturity tests?

[fol. 83] Mr. Ferguson: All kinds, including oil tests.

Judge Halbert: I am not quite sure that I understand how the testimony of this witness is bolstered up by saying that there are other people who are skilled in this line who work with him. Don't we have to depend upon what he tells us here, what he knows of his own knowledge about it?

Mr. Ferguson: I take it that Counsel has asked these questions because there is offered here lists and summaries of tests. He asked him about the fruit that was picked, and who picked it, and how it was picked, and I am asking him the same thing, to identify the persons who helped to do it and their qualifications, and I think we are on the way to an answer.

(Discussion between Court and Counsel.)

Judge Goodman: Is there any difficulty in examining the quantity of oil in an avocado?

Mr. Ferguson: Any difficulty?

Judge Goodman: I mean that wouldn't require any great skill, would it?

Mr. Ferguson: We want to show that the persons who actually did it had training and the qualifications.

Judge Goodman: Well, let's assume that they had. What is the materiality of that?

Have you got any other examination?

Judge Halbert: I take it Dr. Harding assumes the [fol. 84] responsibility for what he is saying here, that he is not relying on what somebody has told him. If he is it is clearly inadmissible.

A. I take the responsibility for that, sir.

Judge Halbert: In other words, what he is telling us here is what he believes to be the correct situation, and he is not relying upon other people's word in that regard?

Judge Bone: There is a certain percentage of oil in an avocado—this is coupled with a question—would it affect the matter of taste, the way it tasted to the average user, and to what degree does it affect the taste of the avocado? More oil better taste, less oil less desirable taste?

A. That is a rather difficult thing to say, because people who are accustomed to higher oil may prefer higher oil. People who are accustomed to low oil may prefer that.

Q. I am thinking of the reasonableness of this regulation in California here. What are we going to base this doctrine of reasonableness on. That is going to creep into this so far as I am concerned, regardless. Regulation about the amount of oil, what does that have to do with the taste? I know what bananas taste like. Now maybe because they matured and ripened they looked good to me as a kid, and they still do. But how does the oil affect the taste?

A. That is what we are trying to bring out, sir, that you have these different races that have different characteristics [fol. 85] and it is most difficult to show in an oil—

Q. Well, a lot of people might like one flavor and some another. Is there a change in the flavor of the avocado basically, is the flavor changed in any way in the presence of 8 per cent or 6 per cent of oil?

A. In our tests it is not related, sir. We compare one variety with another.

Q. Well, you testified to that earlier in your statement, that this was not related directly, but since this issue is written around us of 8 per cent oil test I want to know what is unreasonable in 6 per cent and reasonable in 8 per cent.

Judge Goodman: Or the other way.

Judge Bone: Or the other way. For three men who are not experts in this field who have to decide a question like that, I would like information.

A. I think you would find if you grew avocados and you had this wide range of avocados, that you would not want it on an oil basis at all.

Q. Well, of course, I don't like the flavor of an avocado anyway, I couldn't be hired to eat one, and I am not an expert. My wife likes them, and I didn't.

Now, does the taste, the desirability of an avocado depend on the percentage of oil in it? Does that provide a flavor that makes the avocado desirable to the user?

[fol. 86] Maybe that is a crude question, but it is interesting to me. Because here your opponent is going to support this regulation of California on the grounds of reasonableness, it doesn't do violence to fair standards, it is not an outrageous thing. Therefore it must be reasonable. If it is utterly unreasonable then it transgresses the rules of fair play, which is constitutional in nature.

A. There would be a fairly easy way to answer if we did not have such an array of varieties that have so many different characteristics to them. So that if you place it on a given oil content you are absolutely condemning those that do not make this. The varieties never will make this.

Judge Goodman: Well, I think what Judge Bone is trying to find out from you is irrespective of variety whether or not the standard of the quantity of oil in the avocado is a reasonable standard—there may be others too—as to the maturity and flavor and acceptability of the avocado. Can you answer that?

A. I wish I could answer it, but—

Q. Well, it has something to do with it, hasn't it?

A. Apparently you do have two parallel things. As fruits ripen they get better, within any range of oil. On the other hand, as fruits usually stay on the tree they also increase in the oil content. Slightly some, other varieties more rapidly. Whether it is the relation of oil, or whether it is [fol. 87] the relation of maturity, you see, is the real problem.

Q. These regulations that you refer to and that counsel has referred to are all regulations of the Department of Agriculture that pertains only to Florida, is that right?

A. It does regulate—it did regulate the avocados coming in from Cuba.

Q. Well, the regulations in those are specifically restricted to avocados in Florida, both the Exhibit A and the Exhibit C.

Mr. Ferguson: May I answer your Honor?—

Judge Goodman: The grade standard as amended is the Florida Avocado Order as amended. So those Federal regulations you refer to are regulations that pertain only to Florida, isn't that right?

A. I know—

Mr. Ferguson: Your Honor, may I add—

Judge Goodman: Well, maybe you can answer it.

Mr. Ferguson: May I add to that by a different regulation the Secretary made the Florida standards applicable to Cuban avocados.

Judge Goodman: But in the United States these regulations apply only to Florida?

Mr. Ferguson: Oh, yes, these regulations that are in evidence in this case apply only to Florida.

Judge Goodman: Now one other question that I would like to ask you, and I hope counsel will pardon us for asking [fol. 88] these questions, because we regard this as the nub of the case, we have to know something about these avocados in order to give some intelligent decision as to the question involved here.

The quantity of the oil in the avocado may be, in the language of the street, an element that might be regarded as the richness of the avocado, is that right?

A. Yes, it might, although varieties that are low in oil content often have this buttery flavor that we are referring to.

Q. As a matter of flavor, but I mean as a matter of content?

A. Yes.

Q. Because as the doctors will tell you, particularly those who specialize in cholesterol today—

A. That is right.

Judge Goodman: —that the quantity of oil makes for the richness of the fat, isn't that right?

A. Yes.

Judge Goodman: Thank you. That is all I have.

By Judge Halbert:

Q. Dr. Harding, how many varieties of avocados are grown commercially in Florida?

A. Well, we regulate some 44, I think it is.

Q. Then there are 44 varieties?

A. Yes.

Q. Of those 44 varieties how many of those varieties under no circumstances would ever reach as much as 8 per cent in oil content? It need not be precise, just approximately?

[fol. 89] A. I would say that are grown commercially, maybe five or six varieties, maybe more.

Q. So that there are 38 or 39 varieties that do—

A. Oh, no—that attained some time during its sphere?

Q. Yes, when they mature.

A. Oh, when they mature?

Q. Yes.

A. Oh, well, that would affect a great many more. It would affect a very large cross section.

Q. Of the Florida avocados that when they mature would have 8 per cent or more?

A. Would have below 8 per cent when they matured.

Q. I don't think I asked it that way. I think I asked it the other way. How many of these reach 8 per cent or more?

A. Then I would answer the question that it would be limited to maybe half a dozen.

Q. Six varieties?

A. Yes.

Q. Can you tell me what varieties you are referring to now?

A. I am referring to later in the season the Lula would average it, the Booth 8 would, in very late season perhaps, the Booth 7 would. Those would be the leading ones, leading varieties.

Q. Well, that is only three, and you said there are about six varieties?

A. Yes, but there are some varieties that are very minor, [fol. 90] like Linda and the—

Q. Well, let me ask it in another fashion, then: What percentage of the avocados that are grown commercially in Florida and shipped commercially outside of the State, what percentage of those would fail to reach 8 per cent or more in oil content if they were allowed to mature in that state?

A. This is purely an opinion, of course—

Q. Well, of course, you are an expert, and that is what we are asking for, is your opinion?

A. I would say 40 per cent of the crop.

Q. I understood you to say earlier that the Lula was the—

A. The leading variety.

Q. —the leading variety.

A. Yes.

Q. What percentage of the avocado crop in Florida is the Lula?

A. I think about 27 per cent.

Q. And the Booth 8?

A. I can give you that (referring to documents).—

Mr. Ferguson: While the witness is looking, may I suggest that your Honor add another factor to the question, time? Time when they reach or pass 8 per cent.

Judge Halbert: Well, I don't want to add that. I want to talk about this oil content alone. You said 27 per cent of the avocados were Lulas?

[fol. 91] A. Yes.

Q. How about Booth 8?

A. About 18 per cent Booth 8.

Q. All right, Booth 7?

A. 10½, 10.25.

Q. Lindas?

A. Let me put Waldins next, because that is the next we have.

Q. All right, Waldins.

A. 9 per cent. Booth 1, 5 per cent.

Q. All right.

A. And then all the rest are below 3 per cent of production.

Q. Then Linda is not one of the principal ones.

A. Oh, no.

Q. Well, you gave it to me a moment ago?

A. I gave it because of the high oil content.

Q. Now, are all these six that you have given me here now, or five that you have given me here now, are they all avocados that would reach 8 per cent oil content?

A. During some time of its life if it were left on the tree, most of the Lula avocados would meet 8 per cent. A part of the Booth 8.

Q. Well, I make that 69 per cent of your production of avocados?

A. But, here is the point, sir: Lula avocados may be picked long before they reach 8 per cent. At some time in [fol. 92] its life it is going to reach 8 per cent.

Q. Well, Dr. Harding, the only question before us here as I see it—maybe my brothers won't agree with me—is whether or not this regulation in California is an arbitrary one, and if I understood your testimony correctly the California regulation could be met by 61 per cent of the avocados in Florida.

A. I don't think that is the way I meant it. You asked the question will they meet it some time. They may meet it, but maybe that would be the last 20 per cent of the shipment of that particular variety.

Q. Isn't that the whole story that brought on all these agricultural regulations. My folks, when they were alive, had oranges starting back in the 1890's. People kept getting more and more hoggish and they kept picking their oranges earlier and earlier. In the area where I grew Washington Navels became ripe in the Fall. They are not fit to eat until about January or February for anyone who lived where they were grown. But they kept moving them back until they were picking oranges in September and

sending them back east, and then they wondered why they got red ink on them. The point is that if they leave the fruit on to the proper date it does affect the fruit, it just simply affects the time when they get their money for it, isn't that it?

A. There is a lot of reason to that. On the other hand, [fol. 93] these West Indians and Waldins play a big part there, and the Booth 8. They are acceptable and desirable even before that time. They are mature. Now they may not have reached prime condition, but they are mature. They are acceptable. They are pleasing to the taste.

Q. Well, the West Indians we are not discussing in this 69 per cent, are we?

A. Yes, I listed Waldins.

Q. Is Waldin a West Indian?

A. Yes.

Q. I thought that was a hybrid.

A. No, that is West Indian.

Q. Well, we are talking about 9 per cent then, with Waldins. What else of this list here is West Indian?

A. Lula, Booth 8, Booth 7. Those are all hybrids.

Q. I assumed they were, with those names.

A. Yes.

Judge Goodman: All right, Mr. Ferguson, anything else?

By Mr. Ferguson:

Q. I would like to put the same question, Dr. Harding, in relation to the time of picking under the maturity regulations, whether or not these avocados have reached 8 per cent by that time, or whether if you say that they may ultimately reach 8 per cent, what is that time in relation to the marketability of the fruit?

A. Well, in the case of Waldin you would probably have [fol. 94] all your crop drop. In the case of the Booth 8 you probably would shorten the season far beyond what it should be shortened, and with some of the other varieties the same way. They would be overripe, they wouldn't have the carrying qualities.

Q. Does that mean then that just by leaving an avocado

on the tree a longer time it might have more oil but would either drop or be unmarketable?

A. It would mean that in the case of some of these the crop would be on the ground. In the case of others they may be overripe and not have carrying quality. In other words, you couldn't ship them any length of time or any distance. So in reality it would affect it the same way. It would mean that they would be practically unmarketable.

Q. And you say it is your opinion that the question has to be answered in relation to the proper time for picking and marketing?

A. Yes.

Q. Could you state a percentage that in your opinion would survive long enough for marketing with 8 per cent or more? I didn't quite get it when you answered his Honor on that question.

A. Very likely I avoided that question, because I don't know.

Mr. Ferguson: I may say that there is a great deal of data already in the record bearing on that.

[fol. 95] Judge Goodman: Can Counsel agree whether or not the United States Department of Agriculture, the Marketing Service, has issued any grade standards for California avocados?

Mr. Fourt: There are grade standards for avocados which are available for any State that wants to use them. The State of California has never adopted those grades.

Judge Goodman: Florida is the only state in the United States for which the Agricultural Marketing Service has provided grade standards for avocados?

Mr. Fourt: That is correct.

Judge Bone: Nothing of that kind has ever occurred in California?

Mr. Fourt: The State has enacted its own grade standards, sir.

Judge Bone: Well, would that preclude the Department of Agriculture Marketing Service coming in and establishing grade standards?

Mr. Fourt: No, no, it would not. Definitely not.

Judge Bone: You see how it gets into this picture, Coun-

sel: Your opponent has cited this regulation that we are talking about here applies only to Florida. It has an Interstate Commerce connotation. There is no Federal action here in California?

Mr. Fourt: That is correct.

Judge Bone: It is a unilateral action by the State of [fol. 96] California?

Mr. Fourt: That is correct.

Judge Halbert: May I ask you, if you can answer this, is it not a fact that the State has to ask that these regulations be put into effect? It is not something that the Federal Government acts upon or imposes upon, it is something that the growers ask, is it not?

Mr. Fourt: Yes, the growers and handlers petition the Secretary of Agriculture and they have a referendum in the industry as to whether they want the Federal regulations imposed on them.

Judge Halbert: Florida has asked this, California has not.

Mr. Fourt: That is correct. I have another question.

Judge Goodman: Have you finished with your redirect?

Mr. Ferguson: Go ahead.

Recross examination.

By Mr. Fourt:

Q. Doctor, you are acquainted with Dr. R. L. Harkness?

A. Yes.

Q. Who is he?

A. Dr. Harkness is Associate Horticulturist at the Agricultural Station at Homestead.

Q. Have you read the papers published by him?

A. I have.

[fol. 97] Q. In your testimony and opinions do you rely in part on his papers and research?

A. We have had a cooperative project, as you know, and you are probably referring to papers in connection with our work. Yes.

Q. So it is a cooperative project between yourself and Dr. Harkness?

A. It is a cooperative project with the Florida State Experiment Station.

Q. Is he a member of that station?

A. He is a member of the station.

Mr. Fourt: No further questions.

Mr. Ferguson: That is all.

COLLOQUY BETWEEN COURT AND COUNSEL.

Judge Bone: Is there anything, Mr. Fourt in the record, the public record here, which indicates what motivated California, the Legislature, I assume, in adopting this rule? Is it grounded on public health, public morality, public welfare, or what is the purpose of it? It may be you will cover it in your testimony. If you are I will abandon the question.

Mr. Ferguson: There is nothing in the record, if that is the question.

Mr. Fourt: The available scientific publications indicate that there was a severe problem prior to 1925 of infested fruit and the marketing of fruit that fell on the ground. [fol. 98] (Discussion between Court and Counsel.)

Judge Goodman: Well, let's get back to our record here. Do you have something else to offer for the Plaintiffs in the case.

Mr. Ferguson: Just by reference to the Federal Register. This is it, your Honor: There is now in evidence, in one way or another the maturity and quality regulations under this Marketing Order for four seasons, 1954-'55, 1955-'56, 1956-'57, 1957-'58. That is where we ended our testimony before.

Now, I wish to add by reference to the Federal Register the maturity regulations in two other completed seasons, 1958-'59, 1959-'60, and perhaps it will be sufficient for me to give the citation to the Register and I will give Counsel copies, mimeographed copies of these regulations.

For 1958-'59, it is Order No. 16, an original order and eight amendments, Federal Register 23, pages 3104, 4349, 5476, 6318, 7343, 7943, 8047, 9055, and 9689, and one in Volume 24 at page 1152.

And then the maturity regulations for the 1959-'60 season, Order No. 18, the original order and six amendments, all in Federal Register 34 at these pages: 4050, 4827, 5824, 6904, 7354, 8843, and 9262.

Judge Bone: What materiality have those orders in the Federal Register? What bearing do they have on what we [fol. 99] have to wrestle with here?

Mr. Ferguson: The crucial matter in this case, your Honor, from a commercial standpoint, is the time when these avocados are ready to be marketed, which is fixed by these orders. Our evidence shows that at that time there are very few of them that could possibly meet this California test, so that the result is to impose an embargo on most all of the Florida avocados. It is only late in the season when most of the Florida avocados have been marketed elsewhere and the California embargo has been in effect all the time, it is only late in the season that some of them come here at risk. Some pass and some do not pass. But the point is that these are very important.

Judge Bone: Are these regulations you are now referring to?

Mr. Ferguson: Oh, yes, your Honor.

Judge Bone: You think they have direct bearing on the issues here?

Mr. Ferguson: Yes, your Honor.

Judge Bone: You read off a whole list of them, and I couldn't have written them down if my life depended on it.

(Further discussion between Court and counsel.)

Judge Goodman: Is there anything that you want to add?

Mr. Ferguson: Yes, I was going to add the supplemental quality regulations, which are Order No. 17 in 24 Federal [fol. 100] Register at 3105 and 9123.

Also in the Federal Register—and these I have no copies to furnish; I have written to Washington and asked for someone from the printing office to send them, and undoubtedly will get them in due course, but I think they should be in the record—the notice of hearing on this plan and the decision of the Secretary and his findings, which are quoted in the pleadings, and in Counsel's trial memorandum, and I would like to know that they are taken by judicial notice.

Judge Goodman: So the record will be clear and to obviate a lengthy discussion on it, the Court will take judicial notice of all references in the pleadings or here in Court to the Federal Register or Federal Regulations at any time.

Mr. Ferguson: Well, I will just state the volume numbers and that is all that is necessary.

Judge Goodman: All right.

Judge Bone: Your position is that they cover the entire United States in effect?

Mr. Ferguson: Oh, yes,—

Judge Bone: Of course, I realize that Florida and California are the two avocado producers in this country, but what you are saying to us is that they affect the whole United States wherever avocados are grown.

Mr. Ferguson: For the purpose of Interstate Commerce, 90 to 95 per cent of the Florida avocados are sold and must [fol. 101] be sold in Interstate commerce.

(Further discussion between Court and counsel.)

Mr. Ferguson: I would like to just give these references, and what bearing they have your Honors will decide in due course.

Volume 19, No. 33, page 909. 19 Federal Register, 2418: 19 Federal Register, 2784.

With that the Plaintiffs will rest.

There is in suspense the status of the record as to the evidence, and also our motion for substitution.

Now frankly I assumed there would be no question whatever about the substitution in view of the prior ruling of his Honor, Judge Halbert; but as there was a sentence omitted from the motion, something I learned of on Friday, I take it I will have an opportunity to add that sentence to my motion, and the motion for this purpose is and has been accepted as pleading, and declarations under Rule 25 can be made in a motion as well as what is called a pleading. If this motion is elliptical and too short, the reason is that the Court having already ruled on exactly the same situation, I didn't suppose there would be any argument about it.

Judge Goodman: Now does that conclude your case?

Mr. Ferguson: Yes.

Judge Goodman: Now, how much time do you want or do you intend to take, or do you think the Court will permit [fol. 102] you to take in presenting what you have to present?

Mr. Fourt: If the Court please, our witnesses, I feel, will take the best part of tomorrow, unless the Court grants the motion we would like to make now at this time, that the Plaintiff's case can be dismissed.

Judge Goodman: All right, make it.

DEFENDANTS' MOTION TO DISMISS

Mr. Fourt: We have no evidence before the Court of any shipments being made to California, no evidence of any interference in California, of any of the Plaintiff's avocados. There is no showing of irreparable and grievous injury required for a three-Judge Court. We feel that at most the Plaintiff's case here has been one for declaratory judgment.

In the absence of a showing of irreparable injury the Court should not reach the Constitutional issues. Our memorandum cites the Steelman case.

(Argument.)

Judge Goodman: Let the record then show that we will take your motion for dismissal after the Plaintiff's case is completed under advisement.

Mr. Fourt: There is a further question, your Honor. We have the problem of Dr. Harding. I would assume that Dr. Harding may want to leave and be beyond the call of [fol. 103] the Court. We take it that the exhibits marked for identification have not been offered in evidence.

Mr. Ferguson: They have been offered in evidence.

Judge Goodman: They have been offered in evidence but we have reserved the ruling on them.

Mr. Fourt: All right, then if the Court please we would like to have Dr. Harding remain within process of the Court in order that we may call him as our own witness in the event those exhibits are admitted in evidence.

Judge Goodman: Will you be here tomorrow, Dr. Harding?

Dr. Harding: Yes.

Judge Goodman: Then we will have no problem. We will take a brief recess.

(Recess.)

Mr. Fourt: If the Court please, we would like to call Mr. Poulsen.

H. W. POULSEN, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?
The Witness: H. W. Poulsen.

By Mr. Fourt:

Direct examination.

Q. Your name, sir?
A. H. W. Poulsen.
Q. Your address?
[fol. 104] A. 1220 N Street, Sacramento, is my business address.
Q. And your present position or employment?
A. I am Chief of the Division of the Standardization and Inspection Services of the California Department of Agriculture.
Q. And is there a Bureau charged with supervision of County, Commissioners of Agriculture under your supervision?
A. There is.
Q. And what is that Bureau called?
A. That is called a Bureau of Fruit and Vegetable Standardization.
Q. When was your first employment with the State of California?
A. In the month of July, 1923.
Q. And what position was that?
A. Shipping Point Inspector.
Q. Have you remained continuously in employment with the State of California since that time?
A. A break of possibly 10 days early in August and back immediately following, and since then continuous service.

Q. Would you briefly describe the successive offices you have held in the State of California?

A. From the shipping Point Inspection work, which I started in 1923, within less than a year I went into the portion of the Department called the Fruit and Vegetable [fol. 105] Standardization enforcement work at that time. This particular work pertained then to enforcement of the fruit and vegetable standards of the Agricultural Code through the County Agricultural Commissioners in various areas of the State.

Following that in about 1929 I became Assistant Chief of the Bureau, and in 1924 Chief of the Bureau, then called the Bureau of Fruit and Vegetable Standardization, and remained in that position until May of last year, at which time I was appointed to the position I now occupy.

Q. Were all these positions civil service?

A. They were.

Q. And were written examinations required for these positions?

A. In all but the first position I qualified in written examinations were required.

Q. Does this employment have any relation to the State law pertaining to avocados?

A. It does.

Q. And would you explain that relationship?

A. Yes. The fruit and vegetable standards of the Agricultural Code contains a section relating to avocados, in which one of the requirements is that the fruit must have attained 8 per cent of oil content. The standards in which this provision is located are enforced by the Department of Agriculture through the County Agricultural Commissioners of the State, and they, the County Officials, [fol. 106] under the direction and supervision of the Department of Agriculture.

The representatives of the Fruit and Vegetable Standardization Department are designated by the Director, and have been over these many years as his representative in the enforcement of these laws throughout the State.

Q. With reference to the statute pertaining to avocados, would you describe the conditions of your own knowledge which led to the enactment of this law?

A. The laws relating to avocados, like many of the other laws, providing standards of quality and maturity, were deemed to be necessary by representatives in the industry due to deplorable marketing conditions. Specifically with reference to avocados, the fruit being produced in the State at that time—the volume, of course, being considerably less than now,—was being marketed by individual growers through their marketing channels without any guidance or directive as to its quality or its oil content, the result being that fruits which were very definitely unpalatable were being placed upon the market, thereby damaging the reputation of the industry by providing consumers with undesirable avocado fruits.

Q. Are avocados ordinarily picked in a hard or soft condition?

A. In a hard condition.

[fol. 107] Q. And are avocados usually purchased by the wholesaler in a soft or hard condition?

A. They are.

Q. No—

A. They are purchased in a hard condition.

Q. And why is this so?

A. Because the fruit itself cannot carry to the ultimate consumer in the softened condition. When it is in the softened condition it is ready to eat at that time.

Q. Can the ripeness or maturity of an avocado be determined from its appearance when it is in a hard condition?

A. Only by a very expert person.

Q. Would a retail grocer qualify in the ordinary case?

A. No, they would not.

Q. How about a person in the wholesale trade?

A. Only if a person representing a particular wholesaler was assigned for a number of years, usually several, to the avocado problem alone could he be able to determine it. It is not easy.

Q. What occurs to the avocado if it is picked in an immature and unripe condition?

A. Very often it shrivels, the flesh becomes rubbery, and is not satisfactory for human consumption.

Q. What relation does the 8 per cent oil content standard have to this problem?

[fol. 108] A. The 8 per cent oil content requirement indicates the edibility, the desirability or palatability, and increases as the fruit continues to grow, and so in my opinion and based on my knowledge it has a direct relation to—the oil content has a direct relation to the maturity.

Q. In your experience how has the standard affected avocados originating in the State of Florida?

Mr. Ferguson: I object to that, if the Court please. There is no foundation for such a question of this witness.

Judge Goodman: It does call for his conclusion as to how it has affected.

Mr. Fourt: Yes, all right.

Q. In your opinion then what—in your opinion is our 8 per cent oil standard valid or has achieved the objective as applied to fruits of avocados originating in Florida?

Mr. Ferguson: I obj ct to that question. That is the ultimate question for the Court to decide.

Judge Goodman: Yes.

Mr. Fourt: Very well. I will withdraw the question.

Judge Goodman: Would you bring out from this witness as to when the requirement of 8 per cent comes into being, at what stage of the fruit's growth?

Mr. Fourth: Yes.

Q. At what stage in the growth and marketing of the avocado does our 8 per cent oil standard apply, when is [fol. 109] the effective time that it applies?

A. It applies as to all avocados which are packed, shipped, offered for sale or sold, and at the time the fruit is taken from the tree.

Q. Where are the inspections of avocados usually made by the County Agricultural Inspectors?

A. As to fruit which is produced and packed in California, the majority of the tests are taken in the production areas in the packing houses in those areas, at the time or immediately after the time that the fruit has been prepared and ready for distribution and sale.

By Judge Bone:

Q. When did this law become effective?

A. In 1925.

Q. 1925.

A. The tests with respect to avocados offered for sale in wholesale markets are taken—the samples are taken, I beg your pardon, generally in the places where the fruit is delivered by the producer or packer to the wholesaler. In other words, at the wholesaler's place of business. In some tests samples are taken at the retail level.

By Mr. Fourt:

Q. With respect to avocados which are brought into the State from the State of Florida where would the inspection usually occur?

A. Most of the tests are made of Florida avocados on samples taken from the truck loads or railroad car loads of fruit as they arrive at their destination, and in many [fol. 110] instances after having been unloaded from the truck or conveyance into a particular warehouse for distribution.

Q. Is there any difference in technique of testing as applied to avocados originating outside the State as to avocados growing within the State?

A. There is not.

Q. Would you describe the mechanics of making the test?

A. Yes, I think I can describe the mechanics of it.

Mr. Ferguson: If the Court please, there is no challenge to the testing. We are not claiming that the testing is not correct.

Judge Goodman: There is no claim that the test is not accurate?

Mr. Ferguson: It is not in issue in this case.

Judge Goodman: I suppose it is only informative, then. Counsel, since it is not in issue.

Mr. Ferguson: It is a highly technical matter. I don't understand it.

Judge Goodman: I beg your pardon?

Mr. Ferguson: It is a highly technical matter, involves

chemistry and a long process. It will take several pages in the record.

Judge Goodman: Do you think you want to take the time on it?

Mr. Fourt: I will withdraw the question, your Honor.

[fol. 111] Mr. Ferguson: It is in the record.

Mr. Fourt:

Q. In your opinion has the 8 per cent oil standard been effective in keeping immature fruit off of the market?

Mr. Ferguson: I am going to object to that question. That is a broad question covering—how many years, 35 years? And to what does it relate? Has it kept immature fruit off the market?

Judge Goodman: I think the question only is has the 8 per cent requirement kept immature fruit off the market, in the opinion of this witness. I think he is qualified to answer that.

Mr. Ferguson: It seems to me the question is too vague and general.

Judge Goodman: Well, it is pretty general.

Mr. Ferguson: It is not about the fruit itself, it is about his job. He is telling the Court he has done a good job, or something of that sort. But what of the fruit which did pass the 8 per cent. The Court is not informed.

Judge Goodman: Well, I suppose the objection again as in the case of the objection made by your opponent goes more to the weight of the testimony than to its admissibility. Overruled.

A. Answer?

Mr. Fourt: Yes, you may answer.

[fol. 112] A. My answer to that is that in my opinion it has done a great deal to keep immature fruit off the market.

Mr. Fourt:

Q. Are there varieties of California avocados which have difficulty meeting the 8 per cent oil standard?

A. There are.
Q. Would you name those varieties?
A. I cannot.

Judge Bone:

Q. What is done with these avocados if they don't meet market requirements? Are they destroyed or are they sold in the course of business?
A. There are by-product uses for avocados, for face creams and other products, which I do not know too much about. But basically the answer is yes. The by-product demand is not too great.

Judge Halbert: I assume, Mr. Poulsen, they can be shipped out, can they, or is this law applicable regardless of whether they are sold in or out of the State.

A. It is applicable regardless of the circumstances, Judge. The law provides that all avocados sold within the state or that are transported within the state or shipped out of the state must meet this requirement.

Judge Bone:

Q. Don't they have to be edible, lawfully edible? In other words, they can be sold, but I am talking about food?
[fol. 113] A. Yes, they cannot be sold without meeting this requirement for food use. They are exempt when used for by-products or for livestock feeding purposes.

Judge Halbert:

Q. And that applies whether it is California or Nevada or Oregon, they have got to meet—if they are California avocados they have got to meet this requirement?
A. That is right.

Mr. Fourt:

Q. Is a handler or other person in possession given an opportunity to recondition a lot if an inspector finds immature avocados in it?
A. Yes, he is.

Q. Will you describe how that reconditioning is usually done, in practice?

A. It is normally done by any difference which the person who has in his possession can use, such as evidences of immaturity, if he is expert enough, by size, or any other means which can be determined.

Q. In your experience is there likely to be less or more oil content in a smaller size as opposed to a larger sized avocado?

A. This varies, but in my experience and based on the theory that the larger fruits on a given tree are older in their development, the larger ones will have more oil in them.

Q. Do most complete truck loads or trailer loads of [fol. 114] avocados have more than one size of avocado in a lot?

A. They do.

Q. And is each size of avocado packed in its own container or are the sizes mixed.

A. Normally they are sized, and each size is packed in its own container.

Q. In most lots which are rejected will the immature fruit be found in the smaller sizes or larger sizes?

A. In my experience, in most lots the immature fruit would be found in the smaller sizes.

Q. Is the handler or person in possession of a lot of avocados brought into the State from, say, the State of Florida, given the opportunity to reship those avocados outside the state?

A. He is.

Judge Goodman: And what is the procedure for giving that permission?

A. The lot in question is rejected on a normal form used for that purpose, indicating that these cannot be offered for sale or sold in the State of California. If the person in possession of the lot requests that the load be taken to a market in another State it is granted and the form designated as a disposal order directing them that this lot be taken outside of the State based upon the request of the person in possession is issued, and this becomes evi-

[fol. 115] dence of the excepted or authorized disposition to the Border Inspectors at the border of the State of California.

Q. Would such a person also be given an opportunity to recondition the lot if he so desires?

A. He would.

Mr. Fourt: No further questions.

Cross examination.

By Mr. Ferguson:

Q. Mr. Poulsen, what is the predominantly racial character of California avocados?

A. Racial character, what do you mean? West Indies, Guatemala, Mexican?

Q. By origin, yes, derivation, the original roof stock.

Mr. Fourt: If the Court please, the question is beyond the scope of the direct examination.

Mr. Ferguson: Well, that is what you were talking about. California avocados and their oil content. You wanted to make them applicable to Florida avocados, so the Court has to know whether it is the same animal.

Mr. Fourt: Well, we asked no questions regarding varieties of California avocados. We will submit the objection, your Honor.

Judge Goodman: The witness is not really qualified. We will overrule the objection. If he can, he can answer.

A. What is that?

[fol. 116] Judge Goodman: Answer that if you can.

A. Oh. I am not able to answer it, doing justice to the question.

Mr. Ferguson:

Q. What is the leading California avocado in volume of production and sale?

A. I think that Fuerty is the leading one in volume of sale.

Q. And what oil content does the Fuerty run?

A. What oil content does the Fuerty what?

Q. What oil content does it attain?

A. Well, it is required by law to meet a per cent of oil content, if that answers your question.

Q. Now, that does not answer my question. Are you familiar with the fruit?

A. Somewhat.

Q. And its characteristics, especially as to oil content?

A. As to oil content I have some information concerning it.

Q. Well, that is what I am asking you about.

A. How high they will go, you mean?

Q. Yes.

A. I have known Fuerty avocados that will test 15 to 20 per cent of oil content, maybe a little better.

Q. Do you know some that go as high as 30 per cent?

A. Possibly.

Q. And they are still marketable with that oil content, is [fol. 117] that right?

A. I cannot testify to that.

Q. Do you know, as a matter of fact whether any volume of Fuerty avocados are sold in the State of California when they attain 8 per cent oil content, just at that time?

A. Is your question whether or not they are over 8 per cent when they are sold?

Q. That is part of the question.

A. Yes, I think that a large portion of Fuertys sold in California exceed 8 per cent.

Q. You said something about palatability. Would a Fuerty avocado with 8 per cent oil content be palatable?

A. Reasonably so.

Q. Well, what do you mean by reasonably so?

A. Well, it is better if it has a higher oil content.

Q. Well now, you know something about the operation of the big cooperative in this State, Calavo?

A. Some.

Q. Do you know whether they sell any varieties at 8 per cent oil content?

A. I have never made it a point to determine that. I don't know.

Q. Do you know anything about the writings of Mr. J. Elliot Coit?

A. I know of J. Elliot Coit, and have seen some of his [fol. 118] writings, but I am not familiar with it.

Q. Do you know his standing in the industry?

A. Yes; I understand he was a research worker.

Q. Did you read his article in the 1957 yearbook of the California Avocado Society about avocados?

A. No, I do not think I have read that.

Q. How many varieties of avocados are there in California?

A. I cannot answer that.

Q. There is a list of about 350, isn't there, but not all commercially important.

A. I would have to inquire as to that.

Q. Well, you have named the Fuerty. What is another California avocado of high volume production and sale? If I mentioned the Haas, would that be next?

A. I don't know that it is next. I am not familiar with the figures in production relating to the volume in connection with the total.

Q. Do you know anything about the oil content of the Haas?

A. Not specifically.

Q. Do you know whether the Fuerty was grown in Mexico—I was thinking of its place of origin—grown in Florida?

A. I do not, no.

Q. Are the Haas?

A. No, I don't know that either.

Q. Or any other prominent California variety?

[fol. 119] A. I do not know.

Q. Well, let me ask you the reverse. Is the Lula grown in California?

A. Not to my knowledge.

Q. Is the Booth 8 grown in California?

A. Again not to my knowledge.

Q. Is the Waldin grown in California?

A. I don't know of it.

Q. Any of the other Booths, 7, 3, 1?

A. Again not to my knowledge, commercially.

Q. Mr. Poulsen, you know enough about avocados to know that there are decided differences in the characteristics of these different varieties, do you not?

A. Yes, I do.

Q. And one of those differences has to do with oil content, is that right?

A. Is that a question?

Q. Yes, that is a question.

A. You are asking me if I know that one of the characteristic differences in varieties is the percentage of oil?

Q. Yes.

A. At what time in its development?

Q. At the time of the marketability from maturity, permissive marketing.

A. Legally 8 per cent is the minimum with reference to [fol. 120] all of them, Mr. Ferguson, in California.

Q. Well, let me put it a little differently: Not all varieties reach 8 per cent at the same time, do they?

A. No. Different varieties have different maturity dates.

Q. When you are talking about maturity dates you are talking about 8 per cent oil content, is that right?

A. Generally speaking, yes, the legal—

Q. Well now, wait a minute. Generally speaking. Is there any other maturity test in the State of California other than the 8 per cent oil content?

A. No legal test or requirement besides the 8 per cent that I know of.

Q. Where would you get it if it was not a legal requirement?

A. You indicated the—

Q. Just a minute. Is there some other source from which you get determination other than a legal requirement? Do you mean it is a trade practice?

A. There is no other than legal one from the standpoint of the law.

Q. I think that answers the question. Now have you with you Bureau circular 101? Have you a copy of that? Your department has set forth instructions about testing, isn't that true?

A. Yes, in the Administrative Code.

[fol. 121] Q. In the Administrative Code. And there was first Bureau Circular 101. Do you remember that?

A. I do not remember specifically. I would have to look at it.

Q. Well, see if I can remind you of it by reading the language, and this is the instructions to the Inspector, that the least mature fruit must be selected from containers which contain the least mature fruit, and that the smaller sized fruit is normally more immature than large sized fruit. Test the smallest fruit first.

Mr. Fourt: If the Court please, if Counsel is endeavoring to prove the contents of the Regulations, we have them here. We suggest that the Regulations themselves would be the best evidence.

Mr. Ferguson: I am not challenging the Regulations. I want to see what is the thought behind that regulation, and what it imports as to maturity, because it says—

Judge Goodman: Counsel, you are arguing about it now. If you want the language of the regulation, Counsel offers it to you. It won't add anything to ask this witness if this is in the regulation. If it is in the regulation it is in the regulation.

Mr. Ferguson:

Q. All right. Mr. Poulsen, what I want to ask you is whether you can look at the avocado and select the least mature by looking at it?

A. You are asking if I can do it?

[fol. 122] Q. You and your staff.

A. In my experience I am not able to do it very successfully.

Q. Well, actually is there any way to determine oil content except by a chemical test, macerating the fruit, and subjecting it to a chemical test?

A. That is the way to determine it actually. The reference you are referring to, as reading from some document there, pertains to the visual evidences of relative percentage of oil content, including the cutting of the fruit.

Q. And size is considered then?

A. The what?

Q. The size is considered then?

A. As a general regimentation, you refer to, size being considered and as indicated in my previous answers here most lots or many lots of fruit have lower oil content in the smaller sizes as compared to the larger sizes.

Q. So size is a way you can judge maturity, is that right?

A. Size is an indication of maturity which is used and can be used in my opinion in an attempt to find the least mature fruit in a given lot of fruit.

Q. Now, reading from the present regulation, which is in the record of this case at page 75, the instruction is: "From the sampled fruit selected for testing individually test the least three mature appearing avocados." So the Inspector is supposed to be able to pick the least mature by appear-

[fol. 123] ance, is that right?

A. That is right.

Q. Then it goes on to say: "When two of these three tests are 8 per cent oil or better, and one of the tests shows less than 8 per cent, but not below 7.5 per cent two additional least mature appearing avocados from the sample shall be tested."

Now that is not in the law, is it?

A. That is not a law?

Q. The law says that you can't sell any avocado in the State of California unless it has 8 per cent oil?

A. This is the regulation you are referring to?

Q. But the regulation is not exactly the same as the law is.

Judge Goodman: Now you are asking him for a legal conclusion.

Mr. Ferguson: Well, it is obvious, of course, the regulation is not—

Judge Goodman: The regulation speaks for itself.

Mr. Ferguson: But this is secondary to the point that judgment is made according to size and external appearance.

Q. Mr. Poulsen, do you know anything about the size of Florida avocados?

A. No, I don't.

Q. Do you know how they compare with California avocados in size?

[fol. 124] A. Well, I can say this, as to some varieties of

Florida avocados I have seen, they have been quite large in relation to some California varieties.

Q. And wouldn't oil content have some mathematical relation to water content?

A. This I am not conversant with.

Q. Do you know personally of the instances in which Florida avocados were shipped here and rejected?

A. I know that some of them happened, but I don't know the details.

Judge Goodman: You don't have first hand knowledge? You weren't there and didn't see it done?

A. Judge, I was in the Department of Agriculture.

Q. No, I mean you weren't at the place where the avocados came in and were rejected?

A. That is correct, I was not.

Q. You got your information through channels?

A. Correct.

Mr. Ferguson:

Q. So you know nothing about the character of the fruit that was rejected other than the fact that it was reported to you that they did not test individually 8 per cent oil content?

A. That is essentially correct.

Q. That is all you know about it?

A. Yes.

[fol. 125] Mr. Ferguson: That is all.

Judge Bone:

Q. Mr. Poulsen, may I ask one question?

A. Surely.

Q. We might as well clear this up, I believe. Are all avocados, Florida importations and California avocados, subjected to the same style and type of inspection?

A. They are, Judge, except that there is no assurance in the present police enforcement set-up that all lots are actually inspected, at all times.

Q. Well, is it a sort of spotty inspection or is some little effort made to take the first look at the Florida avocados?

A. No, there is not that. We concentrate very definitely on the California avocados and when the Florida avocados are showing by the first tests made that they are mature, then less attention is paid to the Florida avocados. In other words, when it appears that a given variety is coming in at the time in a given size—

Q. One other thing: Do you know of your own knowledge what went on in the department as far back as 1925, what sort of importations came into California from the outside, of avocados?

A. Yes, Judge—not of my own actual contact with the marketing problems, because it wasn't quite at the level where I would be involved in that at that time, but I do know, from people in the department—however, this is [fol. 126] hearsay— that the marketing situation—

Mr. Ferguson: I am going to object. The witness has objected for me.

A. Yes, I did.

Judge Bone: Well, that may be covered later. It is 36 years old, this statute, approximately, and I just wondered if there was any history of it that was available to you, or if everything that is known about it now was just handed from father to son, and from predecessor to successor.

A. Judge, if I may go on, I believe there are some publications that carry some of this information.

Judge Bone: That is all.

Judge Goodman: Anything else, gentlemen, of this witness?

Redirect examination.

By Mr. Fourt:

Q. Mr. Poulsen, with respect to all varieties of avocados, in so far as inspection is concerned, as the inspection occurs, or occurred at times, is it usual to find the oil content of a particular variety increases?

A. Definitely.

Q. So at what period of the marketing of a given variety would the inspectors be likely to find fruit below the 8 per cent oil standard?

[fol. 127] A. In the first part of the season.

Judge Goodman: Does that conclude this witness?

Mr. Fourt: Yes.

Mr. Ferguson: There is one question I have.

Recross examination.

By Mr. Ferguson:

Q. Mr. Poulsen, do you know what is the first part of the season for any one variety of Florida avocados?

A. I have difficulty getting your question, Mr. Ferguson. Do I know what is the first part of the season?

Q. For any one variety of Florida avocados?

A. No.

Judge Goodman: That is all with the witness now, gentlemen?

Mr. Ferguson: Yes.

Mr. Fourt: Yes.

Judge Goodman: We will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken until Wednesday, February 8, 1961, at 10:00 A. M.)

[fol. 128]

COLLOQUY BETWEEN COURT AND COUNSEL

Wednesday, February 8, 1961—10:00 A. M.

The Clerk: Case No. 7648, Florida Lime Growers, vs. Warne, et al., further trial.

Judge Goodman: All right, Counsel.

Mr. Fourt: May I see the interrogatories, Mr. Clerk?

If the Court please, we should like to offer in evidence as Defendant's Exhibits next in order the four interrogatories heretofore answered by the Defendant Corporations in this case, and have them marked.

Judge Goodman: Heretofore answered by whom?

Mr. Fourt: Yes, by the—we have four different interrogatories here. They have been answered by the two defendant corporations in this case.

Judge Halbert: Four different sets, you mean, Mr. Fourt, or just four interrogatories?

Mr. Fourt: Yes.

Judge Goodman: You mean the Plaintiffs?

Mr. Fourt: Yes, you are right, yes. Two sets of interrogatories to the Florida Lime Corporation and two sets to the South Florida Growers.

Judge Goodman: Are there a number of interrogatories?

Mr. Fourt: There are four of them.

Judge Halbert: There are four sets, there are two sets to each plaintiff in the case, as I understand it.

[fol. 129] Mr. Fourt: Yes. Is there any objection?

Mr. Ferguson: No. I assume the interrogatories became part of the evidence when filed, but if not—

Judge Goodman: I think we could take notice of them as a part of the record in the case without being offered in evidence, but you may offer them.

Mr. Ferguson: We have some interrogatories answered by the former director.

Judge Goodman: Give them a number, Mr. Clerk.

The Clerk: A, B, C and D.

Judge Goodman: A, B, C and D, all right.

(The four sets of interrogatories referred to were marked Defendant's Exhibits A, B, C and D in evidence.)

Mr. Fourt: May we have this document marked for identification?

The Clerk: Respondents' E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

Judge Halbert: Is this another one?

Mr. Fourt: Yes. This is to be a Defendant's Exhibit, which Counsel for Plaintiffs has kindly stipulated may go into evidence without evidence of authenticity. It is a description of the leading Florida varieties of avocados

[fol. 130] and the production year by year and a percentage figure then in tabular form.

The right hand column of each page states, "Percentage of total crop," and counsel would prefer that that read "percentage of total shipments."

Is that correct, counsel?

Mr. Ferguson: That is right.

Judge Halbert: Is this what I was questioning Dr. Harding about yesterday?

Mr. Fourt: Yes.

Judge Goodman: This is the Florida avocados?

Mr. Fourt: Yes, this is the Florida. May it be marked in evidence?

Judge Goodman: It may be admitted as Defendants' Exhibit E.

(Document referred to was marked Defendants' Exhibit E in evidence.)

Mr. Fourt: May it please the Court, the Court may take judicial notice of the California regulations. We would like to have them before the Court in some manner. Should they be lodged or should we put them in as an exhibit?

Judge Goodman: Just put them in for the convenience of the Court. Is there a reference to the citation?

Mr. Fourt: Yes.

The Court: You have three copies, Counsel?

[fol. 131] Mr. Fourt: Yes.

Mr. Ferguson: These are already a part of the record. I think it is part of an affidavit.

Judge Goodman: He is just presenting them for the convenience of the Court, I take it, Counsel.

Mr. Fourt: Yes.

Mr. Ferguson: There is no objection, of course.

Mr. Fourt: There are two sets of regulations. Here is one and this is the other. (Handing to the Clerk.)

Judge Goodman: What is the effective date of these regulations?

Mr. Fourt: It would be several years past. I will provide the information this morning for the Court.

Judge Goodman: Are these the regulations that were in effect at the time of the events charged.

Mr. Fourt: Yes. These have been in effect at all times since January, 1954.

Judge Goodman: January, 1954?

Mr. Fourt: Yes. They were in effect before that, but at all times since January 1, 1954.

Mr. Ferguson: Counsel, isn't it true that the method for the determination of the oil content is unchanged?

Mr. Fourt: Yes, that is right.

Mr. Ferguson: And the method of selecting samples was changed at a later time, I think in 1957?

[fol. 132] Mr. Fourt: We will give the exact date of 1397.6.

Judge Goodman: So our record may be clear—

Mr. Fourt: Yes.

Judge Goodman: —the statute itself became effective in 1925?

Mr. Fourt: Yes.

Judge Goodman: From time to time various regulations, I suppose, were promulgated, describing the manner in which the regulations are enforced?

Mr. Fourt: The manner in which a sample would be taken, yes.

Judge Goodman: These particular regulations which you are now presenting were in effect at least since 1954 to date?

Mr. Fourt: That is my understanding.

If the Court please, one of the regulations incorporates an official bulletin of the Director of Agriculture which further describes the chemical process of oil extraction. For the convenience of the Court I would like to present this to the Court.

Judge Goodman: Have you three copies of that?

(Mr. Fourt handed documents to the Clerk.)

Mr. Ferguson: I suggest, Counsel, that you get the date of the change, and here is a copy of 101.

Mr. Fourt: We will get that for you.

Mr. Ferguson: I suggest you put that in also.

[fol. 133] (Discussion between counsel.)

Mr. Fourt: May we have this document marked as Defendants' Exhibit next in order?

The Clerk: Defendants' F.

(Document referred to was marked Defendants' Exhibit F for identification, being Copy of Complaint filed in Superior Court, Sacramento.)

Mr. Fourt: May it please the Court, we appreciate that the Court has indicated it is going to pass on the merits of the case and will do so very shortly.

We would like to inform the Court that the State has filed an action for declaratory judgment against these Plaintiffs in the Sacramento Superior Court, and such an action is pending. Now this is along with our thought that should the Court, in its discretion deem that there is adequate remedy in the State Court that then this might be the vehicle which the Plaintiffs might avail themselves of, and this is the only purpose.

This is a certified copy of the Complaint, and we would like to offer it in evidence.

Judge Goodman: When was that filed?

Mr. Fourt: It was filed August 17, 1960, in the Sacramento Superior Court.

Mr. Ferguson: I don't see how that belongs here.

[fol. 134] Judge Goodman: You just want to advise us that there is a case pending in the State Court involving the same parties?

Mr. Fourt: Yes.

Judge Goodman: In which the State is asking for declaratory relief against the Plaintiffs in this action?

Mr. Fourt: Yes, that is right, and involving the same issues as are presented in this petition.

(Discussion between Court and counsel.)

Judge Goodman: Now, can we just get with the evidence now, Counsel?

Mr. Ferguson: Perhaps at this time I may make a suggestion which may help to expedite the hearing, and that is regarding the deposition testimony and exhibits. My suggestion is that all questions of relevancy and materiality of this evidence and the exhibits 1 to 22, inclusive, can better be considered by the Court in the arguments of the case, and if this includes questions of admissibility they can be argued to the Court.

Judge Halbert: Mr. Ferguson, that is what we suggested yesterday, that we take this matter up and allow you to discuss this in your memorandums, not in your argument.

Mr. Ferguson: Yes. I am not asking counsel to waive any objections.

Judge Goodman: You have said that already, Counsel.

[fol. 135] Mr. Ferguson: That is fine.

Mr. Fourt: Shall I call the next witness, your Honor? Dr. Appleman.

DAVID APPLEMAN, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?

The Witness: David Appleman.

Direct examination.

By Mr. Fourt:

Q. Your name?

A. David Appleman.

Q. And your address?

A. 545 Muskingum Avenue, Pacific Palisades.

Q. Your profession, sir?

A. I am a Professor of Plant Nutrition at the University of California.

Q. And what are your educational qualifications for that position?

A. Prior to that I had to get a Ph.D. degree.

Q. Did you obtain such a degree?

A. Yes, I did.

Q. And from which university?

A. From the University of California in the year 1935.

Q. And what was your specialty or major interest in that [fol. 136] degree?

A. Plant physiology and biochemistry.

Q. Have you engaged in research on avocados?

A. Yes, I have.

Q. And is this a part of your position at the University of California?

A. I utilize avocados for some of the work I am doing, some of the research I am doing, as a subject material.

Q. And when did you first commence your research on avocados?

A. In 1936.

Q. And has any of this research related to the development process of the avocado?

A. Yes, it has.

Q. And is this research related to the oil content of the avocado?

A. In the development of the avocado the oil is one of the substances that develops and changes during the process of development, and as such I have studied it.

Q. In your opinion is oil content a reliable index of avocado maturity?

A. In my opinion it is as good an index as we can have at present.

Q. And what is the basis for that view?

A. The basis of this view is practical experience. That is, by experience we have found that when the avocado [fol. 137] reaches a certain oil quantity it becomes edible. Prior to that it is not very attractive as a food.

Q. Is the 8 per cent oil test standard a reliable index of maturity?

A. It is as reliable as we—the best we can have at present.

Q. And what is the basis of that view?

A. Well, from our long years of experience we have found that when the fruit reaches that oil content, while there are no evident physiological changes as yet discovered, the fruit ripens normally; that is, it softens without shriveling, with darkening of the flesh, and it becomes attractive to the consumer.

Q. For commercial purposes is there a desirable period of time during which an avocado would soften after being picked?

A. Well, I would just generalize that if it takes an avocado from the time of picking to softening, say more than a time of 12 days, that is an indication that it has been picked prematurely. It should not take any longer than about eight to ten days.

Q. What would be the storage conditions during this 10 day period?

A. This is at storage room temperature.

Q. Would the period be longer if the fruit were refrigerated or cooled?

[fol. 138] A. I would expect so.

Q. What is the effect on a Lula avocado if picked at a 6 per cent oil content with respect to the period of softening?

Mr. Ferguson: There has been no question indicating that the witness ever made any study of the Lula avocado, and particularly Lula avocados grown in Florida.

Mr. Fourt: Yes. The Lula is a Florida variety.

Judge Goodman: You might qualify him.

Mr. Fourt: Very well.

Q. Doctor, have you reviewed the scientific literature on Florida varieties of avocados?

A. Yes.

Q. And particularly have you reviewed the work of a Mr. Stahl?

A. Yes, I have read his bulletins.

Q. Did that bulletin contain detailed studies of softening times and oil content?

A. It has studies on softening and on the physiological changes that take place in an avocado during growth and ripening, and I believe the studies are made by a person who is reliable. There is one criticism that is frequently made—

Mr. Ferguson: I am going to object. The witness is going ahead and telling about the work of Dr. Stahl in 1933.

Judge Goodman: Sustained.

Mr. Fourt: Thank you, your Honor.

[fol. 139] Q. Doctor, have you made a study of the fat content of avocados?

A. In my studies of development I have studied the fat content, yes.

Q. Is there such a thing as an unsaturated fat within the oil content of an avocado?

A. A large proportion of the fat in the avocado is unsaturated, I would say 85 to 92 per cent, something like that.

Q. Now, does this unsaturated fat have any relation to the development of cholesterol in the human blood system?

A. I am not in the medical field, but what I know from the literature—

Mr. Ferguson: Now wait a minute. He says he doesn't know, and he is not qualified.

Judge Bone:

Q. May I ask you on the term "unsaturated fat", we have heard so much about that on T.V. in connection with heart trouble: Is that a medical term or is it a chemical term?

A. No, it is a biochemical term. The medical men know very little about unsaturated fat.

Q. What is the so-called unsaturated fat? Satisfy my curiosity for a minute, will you?

A. Well, fat is made up—if you permit me a few moments—

Q. Oh, certainly, yes, and use curbstone english and then I will understand you.

[fol. 140] A. Fat is made up of two chemical entities. There is a glycerin molecule which consists of three carbons. To each one of these carbons is attached the chain which is known as the fatty essence—

Q. Well, keep it down to the curbstone english level.

A. Yes. Well, you can mention then you have three points, to which are attached long chains. Now, all fats have the same glycerin molecule. It is the glycerin you normally know from the drug store.

Now these fats are made up of 16 to 18 carbon units. In other words, if you consider a chain of 16 carbons attached to one another, and they can be attached either by a single bond—never mind at the present what a bond means, the bond has certain electrical properties,—or they can be attached by double bonds. In other words, you see two carbons are connected by two links. The connection of a carbon to another carbon by a double bond is called "unsaturation". It is unsaturated because whenever you connect two carbons with a double bond you have to take out a hydrogen atom from each one. Therefore they are lacking that hydrogen atom, and so they are unsaturated. So the

difference between the saturated and unsaturated, the unsaturated is less stable, and it is more active.

Judge Goodman: The unsaturated is less stable?

A. The saturated is more stable, the unsaturated is less [fol. 141] stable, and being less stable it is more active. Anything that is unstable is more active.

Judge Goodman: You mentioned activity. What is the activity?

A. The activity, it can react with other chemicals to a greater extent, in the process of metabolism it is more active there, and in the process of digestion and assimilation.

Judge Halbert: What is your field? What do you classify as your field?

A. My field is what would be called basic research. I am interested—

Q. No, I mean are you a chemist or a biochemist or a medical doctor or—

A. I am a biochemist.

Q. You are a biochemist, all right. It is my understanding from the little literature I have recently read that the world renowned man in this field is a Canadian who is only a biochemist, not a medical doctor. He works with Dr. White.

A. Charles White, yes.

Q. But the man, I have forgotten his name now. He is up in Montreal, I believe. He is a great researcher in this field?

A. Cuastel(?)?

Q. No, that is not the name. It is more common than that. I would say Dowd, but I don't think that is correct.

A. I don't know him.

[fol. 142] Q. Well, his picture was on Time three weeks ago.

A. Well, recently they have found that the unsaturated fats, the more active ones, are less likely to form cholesterol bodies in the blood stream. On the other hand, the saturated fats, the animal fats, like the fat you get in beef, and in other meats, which is usually saturated, is likely

to produce a greater formation of cholesterol bodies, along the walls of the arteries, and—

By Judge Goodman:

Q. And you say, to shorten this, that the fat in avocados is the unsaturated fat?

A. It is largely unsaturated. This is true of all plant fats, with the exception of palm fats, that is, from the palm tree.

By Mr. Fourt:

Q. Does the unsaturated fats have an effect on the saturated fats?

A. It is believed now by some nutritionists that if one consumes a certain amount of unsaturated fat he can then accommodate a greater amount of saturated fat.

Q. Doctor, is there a difference between growth and development in avocados?

A. Well, the physiologists always look upon growth and development as two processes, although they coincide, of course, and go along together; but by growth we mean enlargement in size, in volume, in weight. By development we mean differentiation for measurement of organs and [fol. 143] this sort of thing.

Q. Can the growth of an avocado be affected by applying nitrogen to the plant or to the tree?

A. It is believed by horticulturists, and I have seen some evidence of it myself, in the orchard, that when a high fertilization with nitrogen is given to trees they make a great deal of vegetative growth and less fruiting, and also if the fruits do develop they are likely to be larger and less developed in other ways.

Q. Will this treatment with nitrogen also affect the time of maturity?

A. I cannot answer that with certainty, but I would say that it might, because it would delay the development.

Q. Then is it possible that if a tree is given nitrogen development that the fruit might be large but immature?

A. It is very likely that in a tree in the lush state of growth, the fruit might be larger, but yet not reach the

same state of maturity as the smaller fruit on a less developed tree.

Q. Doctor, in your opinion is size a good index of maturity in the avocado?

A. I wouldn't think so. Not certainly early in the season. Late in the season it might be; but then, of course, there is no need of indices.

Q. Does the oil content in the avocado on the tree in-
[fol. 144] crease during the season?

A. Yes. On this I have personal data. The data is clear on this. I think from all the work that I have seen that the oil continues to increase to a point when the fruit is fully mature.

Q. And does the maturity of the fruit increase during the season?

A. Yes.

Q. A moment ago you referred to the problem of size being an index of maturity at the beginning of the season. What was your reason for stating that view?

A. Well, I could cite perhaps one experience I had in 1942. An assistant of mine checked 2000 fruits on the comparability of size. All the fruits were calipered to 2 centimeters, and then we proceeded at stated times to take samples of those same fruits and analyze them so we could see the development starting with fruits of the same size.

I would say that within about two months we already found differences in some of those tagged fruits as great as half a centimeter, which would mean percentagewise a rather large difference, and therefore it would indicate that fruits, even though we were starting with fruits of the same size, they do not necessarily grow at the same rate.

Q. Doctor, does the oil content of an avocado increase after the time it is picked?

[fol. 145] A. Our data, my own data would indicate that during softening there is a slight increase in oil, about 1 to 2 per cent.

I should state it more specifically thus: It is very difficult to determine this really accurately, because when you soften the fruit there is some loss of moisture. Now, what we have done, we have taken a fruit, cut it in half, paraffined one half of it, and let it soften, and analyzed the

other half, and calculating the oil on the original weight at the time when we cut it, and in these cases we have found a slight increase in oil in softening. We can't explain it. Work done in Australia, which I got recently from Robertson, indicates that there is also a slight increase in protein.

Mr. Fourt: You may cross examine, Counsel.

Cross examination.

By Mr. Ferguson:

Q. Dr. Appleman, you said that your studies of the avocado began in 1936. What was the nature of those studies in 1936 and subsequently?

A. At that time I was studying the development of the fruit from the time it was a small fruit to the time it matures. My purpose was simply to study the fruit physiology; that is, how it grows, what changes take place in the oil and the nature of the oil, and I have published one paper. Later on my work was not in that direction. My work primarily dealt with some enzymatic changes in the [fol. 146] fruit. It has nothing to do with maturity or edibility, or any of that phase; but as we studied the fruit, of course we have observed it as a by-product.

My work for the last eight years, I have used avocados simply as material. I could have used other materials, except that the avocado was more suitable for the work I have done.

Actually the work that I have done with avocados during that period was financed under a cancer grant, because it has some relationship to cancer studies.

Q. That is during the last eight years?

A. During the last eight years.

Q. Dr. Appleman, you are at U.C.L.A., are you not?

A. That is right.

Q. Didn't I call upon you at one time and talk to you?

A. You may have, I don't know. I have talked to a lot of people.

Q. I know, but if I called upon you did I not ask you if you were doing any work on the question of maturity of avocados?

A. Yes.

Q. And did you not answer "No" and refer me—

A. Yes, I did, yes, sir.

Q. —to the—

A. I would answer "No," now, I did not do work specifically on maturity.

[fol. 147] Q. Did you ever refer me to the citrus experiment station at Riverside which Dr. Wallace Sinclair is in charge and Dr. Rossi Bean—

A. That is right.

Q. —who was doing work on the question of maturity of avocados?

A. I would say that their work also is of a very fundamental nature, they rarely use the whole fruit. They take out the microcondria. Those are the particles within the fruit which control the respiration mechanism.

You can break a cell and take out of it the bit which is the engine which does all the work, and it is this particle they are studying, and I am also interested in, and so is Dr. Beale in our laboratory.

Q. Well, you do know that there has been a research project carried on—

A. Yes.

Q. —by Dr. Sinclair and Dr. Bean?

A. That is right, I am familiar with it.

Q. And has been in progress for several years?

A. That is right.

Q. Is that not because the 8 per cent oil content has been found to be an unreliable, unsatisfactory standard of maturity?

A. I cannot answer that. That is, I have not seen the [fol. 148] official project. I speak to Dr. Bean frequently and to Dr. Sinclair. I know the work that is going on.

Q. Did you read what they have written on the subject?

A. On maturity?

Q. Yes.

A. No, I haven't.

Q. Now you say that at some time for some purpose analysis was made of samples of the fruit. You are aware, are you not, that there are many varieties—

A. Yes, I am.

Q. —of avocados. In California, how many?

A. Oh, maybe two dozen, or something like that. I don't know exactly.

Q. Do you think it is nearer 300?

A. It may be, that is, if taken all together. I am speaking only of commercial.

I may say at the beginning, so as to save a lot of questions, I am familiar with two varieties, all the work that I have done has been with only two varieties.

Q. And those varieties?

A. The Haas and the Fuerte.

Q. Doctor, you said something about certain samples, and upon the basis of those samples expressed an opinion. Have you any record of those samples and when they were analyzed?

A. Yes. I have a record with me of some unpublished data [fol. 149] which may be of interest to the Court.

Q. Now you say the Fuerte and Haas?

A. Fuerte and Haas.

Q. Have you the dates when they were picked and analyzed?

A. Yes, I have all the information. The date they were picked, the date analyzed; all the information is given in the data I have. If you wish to see it, I would be glad to show it to you.

Q. Well, I will ask you a question and if you wish to refer to your data that is all right. The question is this: You said that at the date of picking of a certain number of samples, that they were of different sizes, and some of them were mature and some not mature.

A. I don't recall having said anything to that kind of effect.

Q. Well, Counsel asked you if size—

A. Yes.

Q. —was a criterion of maturity.

A. Yes.

Q. And you answered that of the samples some mature and some were not mature. Now if you w.... to refer to your data—

A. Yes.

Q. —I want to know whether there was any difference in

the state of maturity, in your judgment, in correlation with [fol. 150] size of the samples.

A. Yes. May I state the basis of my statement on this?

Q. Yes.

A. I have indicated that I have tagged fruit of a certain size, two centimeters to begin with. Subsequent to the tagging I have sampled them periodically, sometimes twice a month, most of the time once a month. Now, starting with the same fruit, as I have sampled them, the sizes varied. They did not all increase at the same rate. So that two months later when they were, say, four centimeters in diameter, and five, some were four, and some were five, of the same fruit that were two at the beginning.

They did not vary very much in their composition, even though the size varied considerably.

Q. That is what I am getting at, Doctor. You say you followed the size, and the increase in size from time to time. Now if you did that—did you do that over a period of years?

A. Well, that was done—well, this experiment was in 1941 and 1942. I have a published paper, and I think—

Q. No, I am talking about your own research.

A. These are both my own research.

Q. 1941 and 1942?

A. There is another one that is a little earlier. I don't have the date, but there is a published paper—let me see if I can find the date. It is similar. This is a year or a little over a year's work.

[fol. 151] Q. Well, Doctor, let me put to you this question,—

A. Yes.

Q. If from season to season you observe the development in size, say weight or measurement, would you thus arrive at a determination that that particular variety of fruit at a certain size would mature?

A. I don't think I would, because I don't think there is that exact relationship between size and maturity.

Q. You say there is no relationship?

A. No exact relationship where I could say that a fruit of a certain size has matured. I cannot say that. I can say that a larger fruit, or a fruit when it becomes larger

is more likely to be matured than a fruit when it is very small. But I can't say that a fruit is mature from size.

Q. Well, if you say that by study of a particular variety—

A. Those are for the two varieties. Whatever I say is based on the two varieties. I want you to be clear on that.

Q. All right. Do you know anything at all about Florida avocados?

A. I don't know anything about Florida avocados. We have trees of this variety in our orchards, and I have seen them, but I have never studied them.

Q. Have you ever eaten one?

A. Yes, I think I did on one occasion. Not one grown in Florida, but a Florida variety grown in California.

[fol. 152] Q. Now, Doctor, there are different races of avocados, are there not?

A. I know there are. I am aware of that.

Q. And what race of avocados preponderantly are grown in California?

A. What races?

Q. Yes.

A. We have all the three races.

Q. Well, I am asking you the Fuertes and Haas, the main ones?

A. The Fuerte is considered a hybrid, and because of the smell of the leaves I think we can consider it is Mexican, but I don't think it has been agreed upon.

Q. Well, don't you know as a fact that the parent plants came from a particular place in Mexico?

A. I don't know that. I am not a horticulturist, and I am not familiar with this fact. As I said, to me, the problem—

Q. Well, you have answered as to the Fuerte. That is a Mexican name, isn't it?

A. Yes.

Q. What is your answer as to the Haas. Is that also—

A. I don't know. I think it was a seedling isolated from a Fuerte growth, as I recall, but I cannot be sure of that. As I say, I am not a horticulturist.

Q. Do you know what race or races the Florida avocados are?

A. The which?

[fol. 153] Q. The Florida avocados.

A. Yes, we have all the three races represented, from what I gathered from reading Stahl's bulletins on the matter.

Q. Is the 1933 writing of Dr. Stahl all that you have ever read about Florida avocados?

A. Oh, I have read now and then a little, but that is about all I have. I have read horticultural literature, and as I started in to say, I have high regard for Dr. Stahl's work—

Judge Goodman: You have answered the question, you have answered the question. You are getting now into a field of cross examination that was not covered on direct.

By Mr. Ferguson:

Q. Do you know what avocados Dr. Stahl tested?

A. He tested about—I can't recall exactly, but certainly about 25 or 30 varieties are given.

Q. Do you know what samples he tested?

A. Yes, I assume—

Judge Goodman: What is the materiality of this?

Mr. Ferguson: Counsel asked him—

Judge Goodman: No—

Mr. Ferguson: Very well, your Honor, I will withdraw the question.

Judge Goodman: Just be quiet a moment, will you, Counsel? The witness was not interrogated about anything [fol. 154] to do with Florida avocados. He said he doesn't know anything about them, and never examined them, and what information he is now giving you is from literature that he has read, is that correct?

A. That is right.

Judge Goodman: So that is immaterial.

Mr. Ferguson: I have withdrawn the question.

The Witness: If I may complete the statement, if you will permit me to—

Mr. Ferguson: I will ask another question.

Judge Halbert: We are not interested in it, Doctor.

By Mr. Ferguson:

Q. You say that in speaking about oil content and the 8 per cent standard—now I understand you are talking only about the Fuerte and the Haas?

A. That is right.

Q. Do you know to what oil content these two varieties run at maturity?

A. I have had myself the experience of seeing Fuertes growing up to 26 per cent, on a fresh basis.

Q. And the Haas?

A. The Haas comes fairly close to that, 24 or 25. That is at the highest state of maturity, when they are almost approaching senescence, old age.

Judge Halbert? Is that like a person getting senile?

A. That is right. Both go through the same phenomena.

[fol. 155] By Mr. Ferguson:

Q. Do you mean that this oil content is a long time after picking?

A. No, this is—a fruit at that high oil content will not be in any good shape more than four or five days after picking when it reaches that high in oil content. It is so far advanced in senescence that it will soften very rapidly and will disintegrate or become useless in a very short time.

Q. Doctor, can you say as to the Fuerte and the Haas, and you say they are similar as far as oil content is concerned—what is the level of oil content at the usual picking time?

A. Now, I don't—

Q. Well, let me ask you: Are they picked at 8 per cent oil content?

A. They are. At least that is the aim.

Q. Well, that is permitted.

A. That is permissible, yes.

Q. Well, do you know as a matter of fact, anything about the marketing of these avocados?

A. Not very much, no.

Q. Do you know when the growers pick them?

A. When can they pick them?

Q. No, not when they can pick them, but when they do pick them, as a matter of commercial handling.

A. Well, I have been to the Calavo because they frequently supply the fruit, and I have seen how they handle [fol. 156] them, but I don't know the details of when or how they pick them, or anything of that sort. That is not my field.

Mr. Ferguson: I think that is all of this witness with that answer.

Judge Goodman: Is that all of the witness?

Mr. Fourt: Two questions, your Honor.

Redirect examination.

By Mr. Fourt:

Q. Doctor, does the Fuerte variety avocado mature at 8 per cent oil content?

A. What do you mean by "mature," I would like to know. That is a word that is hard to—

Q. Yes. In the sense of—

Judge Halbert: Maybe you ought to read the definition of maturity in this book here. It says when an avocado is ripe it is mature and when it is mature it is ripe.

By Mr. Fourt:

Q. Doctor, is there an understanding of the term "mature" in a commercial sense of what an avocado is when it is mature, as a commercially valuable property?

A. In a commercial sense it is a term that is practical. It has no theoretical basis as far as physiological maturity or anything of that sort. I may indicate one thing which may be of interest to the Court. The recent studies by Dr. Beale studying fruits at different stages of growth, starting in with even very small fruits and going on up to ma- [fol. 157] turity and studying the microcondrio behavior—that is, the respiration of the microcondrio particles, he found that up to a certain point—if the Court would permit, I would like to go into this detail. It may have some bearing on the case.

Judge Goodman: Well, I don't know—

Judge Halbert: Doctor, it is going right over our heads, and right along the wall and out the door.

Judge Goodman: I don't see the materiality of this redirect examination so far.

Mr. Fourt: All right.

Q. In the commercial sense of the term is a Fuerte avocado mature at 8 per cent oil content?

A. I would say at 8 per cent oil content it softens to an acceptable state of edibility.

Q. Is the Fuerte—

Judge Goodman: You mean it is ripe?

A. It is ripe to eat. I would say personally I would like an avocado with 12 per cent oil to eat.

By Judge Halbert:

Q. Twelve per cent?

A. Yes. That is much better than one of 8 per cent.

Mr. Fourt: Thank you.

Recross examination.

By Mr. Ferguson:

Q. One question, Doctor: Do you have any record of Fuerte avocados at 8 per cent oil content that you deter- [fol. 158] mined to be mature?

A. What is the question?

Mr. Ferguson: Will you read the question, Mr. Reporter?

(Question read by reporter.)

A. Well, as I have indicated, the term "mature," if you mean by "mature" edible—I don't like to use "mature". By "maturity" what do you mean? In speaking of an animal or a plant it means it is ready to reproduce, and this does not apply to this case, of course.

Mr. Ferguson: I will adopt your suggestion and change the word to the word you used, "edible" or "palatable."

A. Yes, I would say that we have found that at 8 per cent it becomes edible, and as I have indicated—

Q. Doctor, I asked you specifically whether you have any record of such test and determination?

A. I have a record of softening, and I have indicated here on my record—this is done on two successive years—that when it has reached 7.92 per cent oil the fruit ripens but shrivels badly.

The next time when it had 9.85 per cent oil it ripened in 12 days. This is still really not—I would say that 8 per cent oil is about the lowest limit at which it would ripen and still be edible. If I was to set a standard for my own use I would say perhaps higher, for the Fuertes and the Haas. I would like it to be clear when I speak of avocados I mean [fol. 159] the Fuertes and the Haas.

Judge Goodman: Anything else? That is all.

Mr. Fourt: Mr. Wiggs, please.

Presley Wiggs, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?

The Witness: Presley Wiggs.

Direct examination.

By Mr. Fourt:

Q. Your name?

A. Presley Wiggs.

Q. And your address?

A. 549 Segovia Avenue, San Gabriel, California.

Q. Your occupation or profession, sir?

A. I am Assistant General Manager of Calavo Growers of California.

Q. Can you briefly describe your duties in that position?

A. I am primarily engaged in the market division of our organization.

Q. How long have you been an employee of Calavo?

A. Since March of 1931.

Q. In the course of your employment have you ever been associated with the marketing of Florida avocados?

A. Yes, I have.

[fol. 160] Q. And when was this experience first commenced?

A. Starting in about 1939 up until 1957.

Q. And would you briefly describe that experience?

A. I was headquartering in Texas, in San Antonio, Texas, and I had supervision of four offices, offices at Dallas, Houston, San Antonio and Juarez, and we handled Florida avocados during those seasons from those points.

Q. During the same period of time did you also have anything to do with the sale of California avocados?

A. Yes, I did.

Q. During this period of time were both Florida and California avocados sold?

A. There is an overlapping of the seasons, Florida avocados and California avocados.

Q. In the marketing of avocados is there a term called the "trade"?

A. Would you restate that?

Q. Yes. In the marketing of avocados is there a term "The trade"?

A. Yes.

Q. What is meant by "the trade"?

A. The wholesalers, the chains and the retailers.

Q. Are avocados purchased by the consumer purchased in a hard or soft form as a general rule?

A. As a general rule they are purchased in a hard form.

[fol. 161] Q. As a general rule does the wholesaler or retailer purchase avocados in the hard or soft form?

A. As a general rule both purchase avocados in the hard form.

Q. And for what reason would the wholesaler or retailer purchase avocados in the hard form?

A. It is a lower risk if they purchase in a hard form, because in the trade a wholesaler who has soft or breaking avocados, as we call them—that is the state between hard and table ripeness—such wholesaler might lose his profit because he has less time in which to dispose of his inventory.

Q. In the ordinary case what period of time would that be?

A. That varies considerably with the variety of avocado.

Q. Does that time vary as between the West Indian variety and the hybrid variety?

A. Yes, it does. In my experience the ripening of West Indian varieties, such as Fuchs, Pollocks, Trapps and Waldins, is a good deal faster than the hybrid varieties of Florida, such as Booth 7 and 8, Lula, and such varieties.

Q. What happens in marketing sense when the avocado is picked at an unripe or immature state?

A. May I have the question again?

Q. Yes. What occurs when an avocado is picked at an immature unripe stage?

[fol. 162] A. Quite often the fruit shrivels and will only soften to a semi-soft state or rubbery state.

Q. What is the flavor of such an avocado in this rubbery state?

A. Generally not satisfactory to the consumer.

Q. What is the effect on the market if avocados which develop this rubbery state are sold?

A. In my experience I would say that it has a detrimental effect on the sale of avocados in general, in that the consumer does not receive satisfaction from the avocado purchase and therefore she is hesistant to buy again.

Q. In your experience will this affect repeat sales of further shipments of avocados in that market?

A. It will affect it adversely.

Q. Is there a seasonal nature to the market for avocados in California?

A. Yes, there is. There are peaks and valleys in production and consequently in sales. The peak of the California season usually is in February, about now, February and March, and the valley or the low point in production and sales is usually during the period September, October and November.

Q. Are there price variations in avocados in California?

A. Yes. Price varies considerably, depending on the volume or tonnage of avocados offered on the market.

Q. What are the prices now for grade 1 fruit in the Los [fol. 163] Angeles market, freight on board Los Angeles?

A. F.O.B. Los Angeles prices now range $2.75 for $3.00 for a 13-pound net weight container.

Q. What was the price of similar Grade 1 quality avo-

cados, free on board Los Angeles, in September and October of last year?

A. Of 1960?

Q. Yes.

A. It ranged from $4.50 to $5.50 for No. 1 fruit.

Q. When ordinarily does the price break occur after the September-October period?

A. It usually coincides with the maturity of the Fuerte season; approximately around the middle of November and from there on. As the Fuerte fruit matures the tonnage or volume offered on the markets increases materially.

Q. And what effect does this increase of volume have on price, if any?

A. It has a depressing effect on price.

Q. Does Calavo market any variety of avocados containing approximately 8 per cent of oil content?

A. Yes.

Q. And during what season of the year would that occur?

A. Well, it occurs in various seasons as the various varieties reach maturity of 8 per cent. Some varieties mature in the fall, some in the spring, some in the late summer. [fol. 164] Q. Does Calavo market a Fuerte variety at 8 per cent?

A. Yes.

Q. Has Calavo had lots of fruit inspected and rejected by the California Department of Agriculture in the course of its operations in California?

A. We have had some rejections by the State Department of Agriculture, because of low oil content.

Q. In your opinion is the 8 per cent oil standard effective in keeping immature fruit off the market?

Mr. Ferguson: I am going to object to that. I don't know what basis or factor there is here for such a question. He is not asking him now what he did about anything.

Judge Goodman: Overruled.

Mr. Fourt: You may answer.

A. In my opinion the 8 per cent oil content standard is effective in keeping immature fruit off the market.

Q. In your opinion is it commercially profitable to market

West Indian varieties of avocados grown in Florida in California?

A. In my opinion it would not be commercially profitable to market West Indian varieties grown in Florida in California. The best or shortest in transit time that you can expect by refrigerated truck from Florida to California is five days. If fruit on that truck were pre-sold you would probably have another two to three days—it would [fol. 165] take probably another two to three days to dispose of that fruit. If it was not pre-sold before the shipment arrived in California it would take five or more days. This, plus the transit time of a minimum of five days I believe would result in fruit which would not give satisfaction at the retail level.

In my experience I have noted a tendency for West Indian varieties to break down quite rapidly after they have been removed from cold storage. In other words, after the cold has gone out of the fruit. From that point on they ripen quite fast.

So that the retailer, who is primarily interested in making a profit, does not have sufficient time to turn their merchandise and make a profit.

Q. What is the form of the shipments from Florida to California? That is, what mode of conveyance is used?

A. As I indicated the fastest mode is by truck.

Q. Are these trucks cooled or refrigerated?

A. They are refrigerated.

Mr. Fourt: You may cross examine.

Judge Goodman: We will take a brief recess.

(Recess.)

Cross examination.

By Mr. Ferguson:

Q. Mr. Wiggs, you say when you joined Calavo you were [fol. 166] in Texas?

A. No, I joined Calavo in Los Angeles.

Q. And you were assigned to one of the offices?

A. In Texas, that is right.

Q. How many offices does Calavo have?
A. We now have twenty.
Q. I thought you had as many as 33?
A. We did, at one time.
Q. You sell avocados all over the country, do you not?
A. That is right.
Q. And you have sold Florida avocados?
A. Yes, sir.
Q. In what years did you have something to do with the sale of Florida avocados?
A. Well, I had to do with the sale of Florida avocados continuously when in season from 1939 on in the southwest part of the United States.
Q. And did you have experience in selling Florida avocados in California in some year?
A. Not personally, no.
Q. You know that your company did?
A. Yes, from 1952 until 1958.
Q. I have some figures here. Will you tell me whether it is approximately correct. That in a series of years 1951-'52, 1952-'53, 1953-'54, 1954-'55, Calavo Growers of [fol. 167] California sold well over a million dollars of Florida and Cuba avocados in those years?

Mr. Fourt: If the Court please, I believe this is going beyond the scope of the cross examination and he should make the witness his own for this purpose.
Judge Goodman: This is in California you are talking about?
Mr. Ferguson: That they sold in any place. Any place. He has expressed an opinion about the handling of these avocados, and this goes to the direct examination on that point.
Judge Goodman: Overruled.

Mr. Ferguson:

Q. Do you still have the question in mind?
A. Yes, sir. I have our own auditor's figures. He started with the 1951-'52 season.
Q. Those are the ones that I happen to have.
A. It was over $940,000 in that season.

The next season, $1,109,000.

The next season, 1953-'54, $898,000.

1954-'55, $999,000.

Did you go beyond '54-'55?

Q. No, I didn't, but if you wish to add some other years go ahead.

A. I will just answer your question to that point.

Q. Well now, do you know what varieties of Florida avo-
[fol. 168] cados you handle?

A. Yes, sir.

Q. What varieties?

A. You are talking about the United States as a whole?

Q. That is right.

A. We have handled Fuchs, Pollocks, Trapps, Waldins, Booth 3, 7 and 8, Lulas, Taylors, and I am not sure whether we handle any Wagners.

Q. You know, of course, that Fuchs, Pollocks, Trapps and Waldins are so-called West Indian avocados?

A. Yes, I do.

Q. And you may have named some others which I didn't catch. And isn't it true that all avocados that come from Cuba are West Indian?

A. That is my understanding.

Q. Now when did you sell these avocados?

A. You are talking about Florida avocados now?

Q. Yes, talking about Florida avocados.

A. We sell Florida avocados generally over the entire country. Prior to 1952, as indicated, we did not sell Florida avocados in California prior to 1952.

Q. Will you name some cities where you had substantial sales of these avocados?

A. Washington, D. C., New York, Boston, Cleveland, Chicago, Kansas City, Atlanta, New Orleans, Houston, San Antonio, Dallas, Denver, Salt Lake City, Phoenix, El Paso, [fol. 169] Seattle, Portland, San Francisco—no, leave out San Francisco as a major.

Q. Now, to pick out a city, what is the time of transportation of the Florida avocados to Chicago?

A. About two and a half days, 60 hours.

Q. How about Kansas City?

A. About the same.

Q. How about Denver?
A. About three to three and a half days.
Q. And Phoenix?
A. About three and a half days.
Q. Well, you named El Paso, what about that?
A. Three to three and a half days.
Q. And how are they shipped?
A. Mostly by refrigerated truck.
Q. Well, of course it is a fact while under refrigeration the ripening process is slowed down to a negligible point, isn't that right?
A. That is correct.
Q. And you gave the time for transportation to California as five days. Is it five full days.
A. Generally speaking.
Q. And sometimes less?
A. Well, you might get a truck to come in in four and a half days. Now this, as I indicated earlier, is the minimum [fol. 170] time.
Q. Now you say that Calavo has had some rejections of avocados for sale in California because of less than 8 per cent oil content?
A. Yes.
Q. Of what varieties?
A. Of several varieties, Choquettes, Itzamnas, Fuertes.
Q. Fuertes?
A. Fuertes, Navals.
Q. Do you have any records to show at what time of the season you had some rejections of Fuertes?
A. I presume we do.
Q. You have it with you?
A. No, I don't.
Q. How does Calavo determine when to market Fuertes?
A. In our laboratory at Escondido Packing House, we have several employees who are engaged in continuous tests measuring the oil content of samples that are sent in by the growers.
Q. Is that all you do about it?
A. We cannot market them legally below 8 per cent.
Q. I understand that, but I am asking you is that the only determinant that you use?

A. Yes, as far as I know.

Q. You mean that when you offer them for sale you do [fol. 171] so only on the basis of oil content?

A. That is correct.

Q. Do you sell your Fuerte avocados when they reach 8 per cent oil content as a matter of general marketing practice?

A. We start havesting them when they test 8 per cent or better.

Q. And you consider nothing but oil content?

A. That is correct, unless you are talking about grading, outward grading standards.

Q. Well, you do consider some other things. What do you consider?

A. Well, as is the practice in the produce industry we grade avocados as to their external appearance; within a certain tolerance grade No. 1 established; a lower tolerance, grade No. 2, and still lower tolerance, grade No. 3. Culls are not permitted to be sold in fresh fruit channels.

Q. What factors are included in that judgment?

A. In the grading?

Q. When you think they are ready to be sold.

A. We have trained graders on the grading tables who select those fruits which we consider are No. 1 grade, those fruits which we consider No. 2 and those which we consider No. 3.

Q. May I ask you have you personally ever been in that part of the work?

A. I have never actually done it. I have been in the packing house many times and seen it done.

[fol. 172] **Judge Halbert:**

Q. Mr. Wiggs, does the State of California have anything to do with this grading process?

A. Not the grading process. They do have a lot to do with the oil content.

Judge Halbert: Well, that is what I am getting at. I am wondering if we are not getting into a field here that we are not particularly concerned with?

A. There are no grading standards on avocados set by the State of California.

Judge Halbert: Only this 8 per cent oil content?

A. Only the 8 per cent. They maintain an inspector almost continuously in our packing house.

Judge Halbert: In other words the State polices you for the 8 per cent, and you police yourselves as to whether or not they are good looking avocados, whether or not they are deformed or damaged, and all that?

A. That is right, scars and cuts.

Judge Halbert: You do all that yourselves?

A. Yes.

Mr. Ferguson: Thank you, your Honor, you do it so much better than I.

Judge Bone:

Q. The rejection of avocados falling below the 8 per cent is applied equally to California as well as other types of avocados?

A. Yes, sir.

[fol. 173] Q. What I am getting at is there is no selection of any particular place of origin to apply this 8 per cent standard?

A. No. Florida avocados would be tested for their oil content.

Q. Well, would they booted out of the market as summarily as other avocados from Cuba or somewhere else?

A. Yes, they would. The shipper or handler is given an opportunity to regrade.

Q. Well, that is just a problem which, of course, gets into this picture, and I am curious about it.

Mr. Ferguson: We do not claim any dishonesty in the enforcement.

Judge Bone: What is that?

Mr. Ferguson: We don't claim any dishonesty in the enforcement.

Judge Bone: Well then, maybe it is a good thing I asked the question. We eliminate any question about dishonesty, then.

Mr. Ferguson: We say that it is inherently discriminatory.

Judge Bone: That it is what?

Mr. Ferguson: It is inherently discriminatory.

Judge Bone: Well, of course as long as I can remember in the law game, which goes back a long time, if there is difficulty of some compromise in the core between the [fol. 174] Federal Government in Interstate Commerce and the police control of the State, it has been an unending argument, I can't recall when it wasn't, and how they will ever compromise it on some acceptable basis is what puzzles me. I am not going to live long enough to see it. Maybe you folks will, but I won't.

Mr. Ferguson: There is no doubt in the long history of Court decisions dealing with that problem, which is a basic problem in our constitutional system.

Judge Bone: That is right, but of course the States cannot surrender the police control entirely to the Government.

Mr. Ferguson: But it can be taken away from them in various respects when the National Government enters the field.

Q. Now, Mr. Witness, you said that you start marketing Fuertes and other varieties at a certain time of the year?

A. Yes.

Q. And you have observed that from year to year, is that right?

A. That is right.

Q. And is it about the same time each year?

A. Approximately. I can cite a very recent example. This year's crop of Fuertes, for example, is approximately six weeks later than last year's crop of Fuertes at the start of harvesting.

Q. Isn't that an unusual difference, six weeks?

[fol. 175] A. Yes, it is.

Q. Wouldn't the normal difference be a week or two?

A. Within that range.

Q. And you said that the lowest supply of California avocados comes in the fall months, late summer and fall, September, October, November and December, is that right?

A. I don't believe I said December.

Q. Oh, you do not say December. Well, I will limit my question then to September, October and November.

(Witness nods in affirmative manner.)

Judge Halbert: You nodded your head. You have to answer audibly. Your answer is "Yes"?

A. Yes.

Mr. Ferguson:

Q. And that is true from year to year, is it not?

A. Yes.

Mr. Ferguson: That is all of this witness.

Judge Goodman: That is all of the witness?

Redirect examination.

By Mr. Fourt:

Q. Mr. Wiggs, during the time that you were in the southwest was the Calavo Growers organization the marketing agent for South Florida Growers, Inc.?

A. Yes, it was.

Mr. Fourt: That is all.

Judge Halbert: Mr. Wiggs, perhaps it would be well [fol. 176] for the record—I know, but I don't know whether the record knows what Calavo is?

A. Calavo Growers of California is the Marketing Agency for a group of Avocado growers in California. It is a co-operative, a farmers' cooperative organization.

Recross examination.

By Mr. Ferguson:

Q. I would like to put one question: You have answered that Calavo Growers was selling agent for South Florida Growers Association in 1939. What about later years?

A. Continuously until 1958.

Q. You sell the avocados of that company in every State of the Union?

A. Yes.

Mr. Ferguson: All right, that is all.

Mr. Fourt: Mr. Jones, please.

ALBERT C. JONES, called as a witness on behalf of Defendants, sworn:

The Clerk: Your name, please?

The Witness: Albert C. Jones.

Direct examination.

By Mr. Fourt:

Q. Your name?

A. Albert C. Jones.

[fol. 177] Q. Your address?

A. 1006 North Ferndale, Fullerton, California.

Q. Your present occupation or profession, sir?

A. I am Sales Manager for Western Fruit Growers Sales Company of California.

Q. Have you had experience in the marketing of Florida avocados?

A. Yes, I have, dating back to 1951.

Q. And who was your employer at that time?

A. Calavo Growers of California.

Q. And in which areas of the United States did you have this experience?

A. The southwest area, which included at that time the northeast portions of Texas, New Mexico and Arizona, and later in California.

Q. Are there several varieties of Florida avocados?

A. Yes, there are.

Q. And would you name a few of these varieties?

A. Well, there is Fuchs, Pollocks, Waldins, Hickson, Taylors, Lulas, and of course the Booths, of which there are about three different types, ones, threes, eights, and so forth.

Q. Do shipping qualities vary between the Florida varieties of Avocados?

A. Yes. From a working experience I would say that they [fol. 178] definitely do.

Q. And which varieties are the best shippers?

A. I found the Booth varieties, particularly the Booth 8 and the Lula variety, and the Taylor varieties are probably the outstanding ones.

Q. And which varieties were the poorer shippers?

A. Well, as it has been classified here today, I would say the West Indian varieties as a group.

Q. Would you name those varieties?

A. Well, that again would be the Fuchs, Pollocks, Waldins, Hicksons, and one or two others that I have since forgotten.

Q. In your opinion is it commercially profitable to market West Indian varieties in California?

Mr. Ferguson: I am going to object to that. It couldn't be the same at all times. It would depend on the market what the price is. How can it be stated without limiting it to a specific period? If the crop is an over-abundant year and the price is way down, of course it isn't profitable. If the price is attractive—

Judge Goodman: Well, you are arguing, Counsel. You can cross examine him on that.

Mr. Ferguson: The question is not limited in any way in relation to market.

Judge Goodman: It has to be limited to the period in which he had experience. Overruled.

[fol. 179] Mr. Fourt: Mr. Reporter, would you read the question back?

(Question read by reporter.)

A. Again from a working knowledge I would say that due to arrival conditions, which unfortunately were generally not altogether good on the West Indian varieties, as a shipper I would certainly hesitate before shipping West Indian varieties into California.

Q. Would you give an example of personal experience that you had with regard to the West Indian varieties and the shipping conditions?

A. Well, the point that we run into from a marketing standpoint, of course, is the length of time the retailer would have to market or sell the fruit, and of course we run up against considerable opposition if the fruit will not hold up or have what they call at least a normal shelf life, and this results in considerable losses at the retail level, and therefore a resistance is built up not only for this particular variety of avocado but all avocados. So again from a marketing standpoint I would hesitate to market them.

Q. Were losses sustained in the marketing of West Indian varieties in your personal experience?

A. Pardon me?

Q. Yes. Were marketing losses sustained in your per- [fol. 180] sonal experience in the marketing of the West Indian varieties?

Mr. Ferguson: I would object again as not related to any particular shipment. There is no evidence yet that this witness ever handled West Indian Florida avocados in the State of California.

Judge Goodman: I thought he said he did.

Mr. Fourt: In the Southwest, I believe.

Judge Halbert: And he said "later in California," as I understood it.

A. Yes, I did.

Judge Halbert: He said part of Texas, New Mexico, Arizona, and later in California.

Mr. Fourt: Thank you, your Honor. Mr. Reporter, would you read the question, please?

(Question read by reporter.)

A. Yes, there were. Now to the degree, percentagewise or actual dollars or cents, I naturally cannot point that out; but again it relates back to the fact that they were severe enough to result in considerable opposition to buying Florida avocados, one, and even other avocados as a result of this.

Mr. Fourt: You may cross examine.

Cross examination.

By Mr. Ferguson:

Q. Mr. Jones, I will put you the question: Did you ever sell any West Indian Florida avocados in the State of [fol. 181] California?

A. Yes, I did.

Q. And which ones?

A. I sold the Booth and the Lula and the Taylor varieties.

Q. You think they are West Indians?

A. Oh, no, they are not, they are hybrids. I beg your pardon.

Q. Now, I remind you the question was limited to the West Indian variety.

A. Yes, that is right. Not in California.

Q. Never sold any in this state. You say you have had marketing losses. All avocados are perishable, are they not?

A. Very definitely.

Q. Very definitely. So if you don't make a prompt sale you are going to have losses?

A. That is true.

Q. True of every variety of avocados, is it not?

A. No; the length of life of avocados have a considerable bearing on that.

Q. All right, you might have a day or two longer, but if you didn't sell them you would have losses?

A. True.

Mr. Ferguson: That is all.

Judge Goodman: Is that all of this witness?

[fol. 182] Redirect examination.

By Mr. Fourt:

Q. One question. Mr. Jones, is the problem in the West Indian varieties having a short shelf life aggravated if the variety has to be hauled a long distance?

Mr. Ferguson: I am going to object. Counsel said something about shelf life, but we haven't heard it from the witness.

Judge Halbert: That is just what he got through testifying to, that was an important factor, the shelf life of the fruit?

A. Yes, I mentioned that.

Mr. Ferguson: He has also testified that he never handled any in California.

Judge Goodman: Well, of course, what you are asking him is sort of self-evident.

Mr. Fourt: Very well. No further questions.

Mr. Whipple, please.

S. R. WHIPPLE, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?

The Witness: S. R. Whipple.

Direct examination.

Mr. Fourt:

Q. Your name?

[fol. 183] A. S. R. Whipple.

Q. And your address?

A. 3441—13th Street, Sacramento.

Q. Your profession or occupation, sir?

A. At the present time I am chief of the Bureau of Fruit and Vegetable Standardization in the State Department of Agriculture.

Q. Do these duties have any relation to the inspection of avocados in California?

A. Yes, they do.

Q. Will you briefly explain those duties with respect to this limited field?

A. The duty particularly with avocados is to supervise the work of the Agricultural Commissioners and their staffs, and representatives of our Bureau in the testing of avocados in California.

Judge Halbert: Is Mr. Whipple going to testify to something that Mr. Poulsen has already covered?

Mr. Fourt: No; we will cover a different area.

Judge Halbert: I don't know how my brothers feel about it, but I am not interested in any repetition of this here or any cumulative evidence.

Mr. Fourt: Yes, your Honor.

Q. Mr. Whipple, are you acquainted with the equipment used in the California oil test extraction methods?

[fol. 184] A. Yes, I think so.

Q. In January of 1958 did you visit the packing house of South Florida Growers Association, Incorporated?

A. Yes, I did.

Q. Is this latter organization a Plaintiff in this case?

A. As I understand it, yes.

Q. At that time where was this packing house located?

A. It seems to me it was close to Miami, near Homestead.

Q. Is there a laboratory in that house, in that building?

A. Yes, there was.

Q. Would you describe briefly the equipment you saw there?

A. I saw a sink and working bench; close to that I saw a mechanical arrangment for taking the juice out of limes. I saw other glassware used for measuring the cubical amount of juice that was extracted from the limes. That is about the extent of it.

Q. What equipment would be required there in addition to the equipment you observed for them to make oil tests on avocados as we do it in California?

A. That would require a shaker, it would require quite a lot of glass equipment and testing materials. I don't think I can give all of them. Essentially it would also require a refractometer.

Q. What would be the cost of this additional equipment?

A. If they use the type of shaker that we use in our [fol. 185] Sacramento chemistry laboratory I would estimate the cost at about $600.

Q. Is the training of the person to make these tests difficult or fairly easy?

A. Well, I should like to answer that this way: We train

our regular inspectors in this method, and they do it successfully.

Q. Does it take a trained graduate chemist to make these tests?

A. No, it does not.

Mr. Fourt: You may cross examine.

Cross examination.

By Mr. Ferguson:

Q. Mr. Whipple, when you were in South Florida did you also visit the sub-tropical experiment station at Homestead, Florida?

A. Well, I am not sure that I recall it as that name, but we did visit with Mr. Stahl there.

Q. Mr. Stahl. How about Mr. Harkness?

Mr. Fourt: If the Court please, this is beyond the scope of the direct examination.

Judge Goodman: Well, we don't think there is very much point in the testimony anyhow.

Mr. Ferguson: I have one more question.

Judge Halbert: All right.

[fol. 186] Mr. Ferguson:

Q. I am talking about the station where Mr. Harkness is.

A. I can't recall. I do recall meeting Dr. Harkness, yes, but I am not sure where it was. You asked me where it was.

Q. Did you examine the equipment at that station?

A. Well, I recall seeing a shaker there, if that is what you mean, yes.

Q. Is that all you saw?

A. I believe he had a refractometer.

Q. He had complete equipment for making oil tests?

A. I assume so.

Mr. Ferguson: That is all.

Mr. Fourt: No further questions.

Judge Goodman: That is all.

Mr. Fourt: If the Court please, this completes the Defendants' case in chief.

Mr. Ferguson: The Plaintiffs rest again with that understanding that we have about the deposition testimony.

I would like to say a word about the Plaintiff's motion for substitution of the new Director.

Judge Goodman: We will submit that, Counsel.

Mr. Ferguson: Yes, but in view of the position taken by Counsel for the Defendants I would like to now, I thought it would be unnecessary, present a more formal [fol. 187] motion. I would like leave of Court to file such motion within a short time.

Judge Goodman: I think I could speak for my colleagues in saying that we do not attach much importance to that matter, because the testimony of one of the witnesses for the defendant was to the effect that fruit from Florida did come into California, and was rejected by the authorities for lack of oil content. So I don't think it makes very much difference.

Mr. Ferguson: I think the Director should be a defendant. The reason I filed what might be a summary motion was that exactly the same thing happened when Mr. Warne succeeded Mr. Jacobsen, and the Court ruled upon it, and I was making my motion on the same grounds.

Judge Goodman: I think you needn't concern yourself about that, because I think my colleagues and I are agreed that while it is not too clear, which as some time mandates are not, that we are going to follow what the Supreme Court said and decide this case on the merits.

Mr. Ferguson: Well, I would like to have this defendant substituted.

Judge Halbert: I gather that the point that you are now concerned with, Mr. Ferguson, is that there has now been another change in the Director of Agriculture.

Mr. Ferguson: Yes, and I learned about him Friday.

Judge Halbert: As far as I am concerned, unless Judge [fol. 188] Goodman and Judge Bone disagree with me, you can file your motion, and we will consider it as though it were a part of the original motion.

Mr. Ferguson: Within a very short period, whatever your Honor suggests.

Judge Halbert: I think we ought to get to the question of the memos we are going to have filed in this matter.

Judge Goodman: Why don't you file it along with your memorandum? If you wish to put it in formal shape, file it along with your memorandum.

Now before we get to that, there has been testimony of witnesses. Is that testimony of the witnesses going to be written up by either side? The Court feels it should be written up, because this is a case that will require findings, and therefore there ought to be a record to which reference can be made.

Mr. Fourt: If the Court please, a transcript of the testimony of Dr. Harding is now available.

Judge Goodman: We are talking about all the witnesses.

Mr. Fourt: Yes. We have ordered a transcript of Dr. Harding's testimony and no one else's.

Mr. Ferguson: I think we should order the rest then, if the Court feels—

Judge Halbert: I would like to suggest for myself, I think that all of the testimony—I don't care about all these [fol. 189] collateral arguments here, but all of the testimony and all of the stipulations and all of the references to evidence should be written up and transcribed by the reporter, but no documents nor no printed material be included in that record. It can be referred to as an exhibit.

Mr. Fourt: Excellent.

Judge Halbert: Now, as to the documents that have been received by way of depositions, they may be considered read into the record, but need not be transcribed for the purpose of this record by the reporter.

Mr. Fourt: No, your Honor. We have reserved our right to object to each sentence as it is read into the record.

Judge Halbert: I understand that, and furthermore there is no sense in copying this book here again into the record. The Reporter would like it, I am sure, but I don't think the Court wants to read through it, and I don't think counsel would want to pay for it.

Mr. Ferguson: We don't want to make the State of Cali-

fornia pay for it again and raise this two billion dollar budget.

Mr. Fourt: The matter of the depositions we understand is not now in evidence.

Judge Halbert: It is offered subject to your objections.

Judge Goodman: Subject to your objections, which you [fol. 190] can present in your brief.

Mr. Fourt: We would have testimony, then, your Honor, to produce if any of the matters in the depositions are to be admitted into the record, and any of those documents. We feel it is a material prejudice here, and we ask that the depositions be read, and we be allowed to enter our objections.

Judge Goodman: You mean now?

Mr. Fourt: Yes, now.

Judge Halbert: I don't get your point at all.

Judge Goodman: We may decide this case—I am not going to disclose the secret workings of our minds, but we may dispose of this case without any need of acting upon objections to the depositions. We are not going to consider that unless it is necessary. If it is necessary then we will have to have another hearing.

Mr. Fourt: If the Court please, just allow us to raise our objections at this time.

Judge Halbert: You have got that already. We have told you that your objections stand to every word that is in these depositions here, and that if it becomes necessary for us to have another hearing I think we ought to, but I don't think there would be any useful purpose served by our sitting here hour after hour while these things are read to us, and you object to each word and phrase in the matter. [fol. 191] As Judge Goodman has suggested, if we approach that and it becomes necessary we will have another hearing, but I don't want to do it now.

Judge Goodman: For example—I am not authorized to speak for my colleagues, but suppose we were to decide that the regulations of California, to use Counsel's words, not inherently discriminatory, we don't have to rule on depositions.

Mr. Fourt: Yes, you are right.

Judge Goodman: We first have to determine what the

Supreme Court has asked us to determine, which is the merits of this matter. And if it becomes necessary to consider the depositions and the objections we will have to consider them at a later time.

Mr. Fourt: Do I understand, sir, that the depositions are not now in evidence and that if the Court desires to read them there will be another hearing?

Judge Goodman: They are all in evidence subject to your objections and the Court will rule on them when it makes its ruling in the case if it is necessary.

Mr. Fourt: Thank you, your Honor.

Judge Bone: Mr. Fourt, I have one little question of my own, it may or may not have the slightest importance: I think Mr. Wiggs testified about a sort of staging operation at Escondido.

[fol. 192] Mr. Fourt: Yes.

Mr. Bone: And Mr. Whipple testified about the method used by the State, and I believe Mr. Wiggs referred to the fact that some State officials of the Agricultural Department appeared down there.

Mr. Fourt: Yes, that is right.

Judge Bone: Do they make an inquiry into the condition of the avocados at that point?

Mr. Fourt: Yes, in the plant, that is correct.

Judge Bone: That is what I mean.

Judge Halbert: They are stationed there, are they not?

Mr. Fourt: Yes, that is correct.

Judge Bone: Well, I just wanted to clear that up in my own mind.

Judge Goodman: How do you want to file your memorandums, gentlemen?

(Discussion between Court and Counsel.)

(It was ordered that the Plaintiffs have 30 days to file an opening memorandum, the Defendants 30 days to file their memorandum, and the Plaintiffs 15 days to file closing memorandum. Also that the Plaintiffs would have 30 days to file an Amended Motion for substitution of Defendant.)

[fol. 193] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil Action No. 7648

[Title omitted]

AMENDED MOTION AND SUPPLEMENTAL COMPLAINT FOR SUBSTITUTION OF PARTY DEFENDANT—Filed March 9, 1961

The plaintiffs, Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., by Isaac E. Ferguson, their attorney, pray for leave of court to substitute Charles Paul, Director of the Department of Agriculture of California, as party defendant in place of William E. Warne, and as cause for said substitution allege as follows:

1. In plaintiffs' complaint, filed November 13, 1957, W. C. Jacobsen, then Director of Agriculture of California, was named as one of the defendants and thereafter participated in the proceedings herein as defendant until June 6, 1960, when the court granted leave to plaintiffs to substitute William E. Warne, then Director of the Department of Agriculture, as defendant in lieu of W. C. Jacobsen.

2. Said William E. Warne resigned as Director of Agriculture and on January 3, 1961, pursuant to appointment by the Governor of California, James T. Ralph took office as his successor. Subsequently said James T. Ralph resigned as director and on February 1, 1961, pursuant to appointment by the Governor of California, succeeded to [fol. 194] said office and is still performing the duties thereof.

3. Ever since the enactment of section 792 of the Agricultural Code of California in 1925, of the enforcement of which the plaintiffs complain, said statute has been continuously enforced by the officers of the state against all persons, including the plaintiffs, who have heretofore offered avocados for sale in this state, in particular avocados

grown in Florida and shipped to California for sale in this state. The Director of the Department of Agriculture is the officer of the state primarily charged with the duty and authority to enforce all provisions of the Agricultural Code, in particular section 792 of the Code, and plaintiffs allege that said statute will continue to be enforced against them by the present director, Charles Paul, in the manner alleged in the complaint, unless deterred by judgment of this court.

4. There is substantial need for continuing this action against said Charles Paul and the other defendants named in plaintiffs' claim as amended, in order to obtain final adjudication of the issues involved, in compliance with the decision in this case rendered by the Supreme Court of the United States on March 7, 1960, and such further proceedings in the case are now in progress.

Wherefore plaintiffs again pray for leave to amend their complaint by substituting said Charles Paul as defendant in place of William E. Warne, all proceedings in the case to stand as if said Charles Paul had originally been named as defendant, and all pleadings, motions and objections heretofore made by the defendants W. C. Jacobsen and William E. Warne to be given effect as if made by said Charles Paul.

March 8, 1961.

Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., plaintiffs, by Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 195]

Points and Authorities

I.

The substitution of the present Director of the Department of Agriculture as defendant in place of his predecessor in said office is authorized both by federal and state law.

Allen v. *Regents of University System of Georgia*, 304 U.S. 439, 444-445, 58 S. Ct. 980, 982-983.
Estate of Lermond, in 2 Cal. 585.
Weadon v. *Shalen*, 50 C.A. 2d 254, 259-260.

II.

The complaint relates to the further enforcement of section 792 of California's Agricultural Code, in the manner indicated by past enforcement thereof, and such enforcement has been carried on as a continuing duty of the office by all persons who have served as Director of the Department of Agriculture during the past thirty-five years, therefore it is to be presumed that like enforcement of the challenged statute will be continued by the present director, unless he avows a contrary intention, until the statute is repealed or further enforcement thereof in the manner of which plaintiffs complain is prevented by order of this court.

The ruling made by the court on plaintiffs' motion for leave to substitute William E. Warne as defendant in place of W. C. Jacobsen is in all respects applicable to the present motion.

Respectfully submitted,

Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 196] Certificate of service (omitted in printing).

[fol. 197] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER CORRECTING CLERICAL ERROR—Filed March 13, 1961

Pursuant to noticed motion of the defendants herein and for good cause shown, the Clerk of this Court is directed to correct his records nunc pro tunc as of February 8, 1961, to show that Defendants' Exhibits A, B, C and D were admitted into evidence and are in evidence in this case.

Dated: March 13, 1961.

Sherrill Halbert, United States District Judge.

[fol. 198] Stipulation Re Exhibits—Filed April 26, 1961.

Omitted. Printed side folio 585, page 555, supra.

[fol. 200] Stipulation Re Plaintiff Corporations—Filed April 26, 1961.

Omitted. Printed side folio 584, page 554, supra.

[fol. 201] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

SPECIAL APPEARANCE IN OPPOSITION TO PLAINTIFFS' MOTION TO SUBSTITUTE PAUL FOR WARNE—Filed April 26, 1961

Comes now petitioner Charles Paul, Director of Agriculture, State of California, and appears in the above-entitled action *specially only*, and for the sole purpose of opposing plaintiffs' motion to substitute him for William E. Warne as a defendant in this action.

Plaintiffs' motion to substitute the successor Director of Agriculture comes under Rule 25(d), Federal Rules of Civil Procedure:

"(d) *Public Officers; Death or Separation from Office.* When an officer of . . . a state . . . is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Sub-
[fol. 202] stitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens

to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States."

The justification for substitution is the bold statement made in the body of the motion that "plaintiffs allege that said statute [Sec. 792, Agr. Code] will continue to be enforced against them by the present director, Charles Paul, in the manner alleged in the complaint, unless deterred by judgment of this court." (Plaintiffs' Motion to Substitute, p. 2). This language is virtually verbatim from Rule 25(d). No facts are alleged justifying this legal conclusion. In the absence of the requisite showing, plaintiffs' action in substance becomes one against the State and is barred by the Eleventh Amendment. "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State." The latter procedure would be convenient " . . . but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Fitts* v. *McGhee*, 172 US 516, 529.

Plaintiffs cite *Allen* v. *Regents of University System of Georgia*, 304 US 439, 444-445 in their moving papers. However, the person substituted in Allen was a federal officer. By virtue of this statute, Congress has authority [fol. 203] to direct the conduct of federal officers in proceedings brought against them. Ex parte Le Prade, 289 US 444, 458. " . . . Congress is not so empowered as to state officers." Id. at 458.

With respect to federal officers, the only question is whether there is a substantial need for continuing the litigation. Rule 25(d), Federal Rules of Civil Procedure. In the case of a state officer, it must be further established that plaintiff has a quarrel with the official and not the statute book. Ex parte Young, 209 US 123, 159-160. If the

quarrel is only with the statute book, the action is one against the State and is barred by the Eleventh Amendment. *Fitts* v. *McGhee*, 172 US 516, 529. In addition, the requirement that the quarrel be with the official assures that positions have been taken which make the controversy concrete. Compare *Public Service Commission* v. *Wycoff Co.*, 344 US 237.

It follows that plaintiffs have not made the showing required by Rule 25(d), and plaintiffs' motion to substitute should be denied. If plaintiffs' motion is denied, the then remaining defendants would be Edmund G. Brown as Governor and Stanley Mosk, as Attorney General. It is noted that they were joined as defendants over their objection by Court Order filed June 13, 1960. Plaintiffs' motion to substitute had been filed April 29, 1960. Both the filing of the motion, and the granting of the order by substitution occurred more than six months after January 5, 1959, the date when they took office, and therefore beyond the time limitation prescribed in Rule 25(d). No enlargement of this time can be granted by the Court Rule 6(b). The Supreme Court has held that the six months time limit for substituting a new official is jurisdictional. *Snyder* v. *Buck*, 340 U.S. 15, 19; United States ex rel. *Claussen* v. [fol. 204] *Curran*, 276 U.S. 590, 591.

Dated:

Respectfully submitted,

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, Lawrence E. Doxsee, Deputy Attorney General, By John Fourt, Attorneys for Defendants, William Norris, Of Counsel.

[fol. 205] Affidavit of Service by Mail (omitted in printing).

[fol. 206] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., Plaintiffs,

vs.

WILLIAM E. WARNE, et al., Defendants.

Defendants' Reply Brief—Filed April 26, 1961

[fol. 207] Clerk's Note

Citations are to the transcript of testimony at the trial February 7 and 8, 1961, denoted "Tr." and to the transcript of the depositions taken by plaintiffs in Miami, Florida, January 21 and 22, 1958, denoted "Dep. Tr."

[fol. 208] TOPICAL INDEX

Page

[fol. 210] Plaintiffs' Contentions

1. Section 792, California Agricultural Code, as invalid under the Federal Constitution as imposing an unreasonable burden on interstate commerce and because it denies to plaintiffs equal protection of the laws under the Federal Constitution.

2. The Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246, as supplemented by a marketing regulation pertains to avocados grown in South Florida, 7 C.F.R., Pt. 969, pre-empts state authority and thereby invalidates Section 792, California Agricultural Code.

[fol. 211] Defendants' Contentions

1. Section 792, California Agricultural Code, constitutes a valid exercise of the state police power and is not in conflict with either the Commerce or Equal Protection Clauses of the Federal Constitution.

2. Neither the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246, nor the marketing regulation pertaining to avocados marketed in South Florida, 7 C.F.R., Pt. 969, pre-empts state authority and does not conflict with Section 792, California Agricultural Code.

[fol. 212] Summary of Argument

In 1925 the California Legislature enacted an avocado maturity statute, adopting as the test of maturity the requirement that avocados have no less than 8% oil content. California Statutes of 1925, Chapter 350, pages 625, 633. The purpose of the statute is to prevent the sale of immature fruit to consumers and retail merchants since the maturity of the avocado cannot be gauged from physical appearance. This standard of avocado maturity stood without judicial challenge for 32 years before plaintiffs filed the present action.

Plaintiffs ask that the court declare this 1925 State enactment invalid under the Commerce and Equal Protection Clauses of the Federal Constitution and in conflict with the Agricultural Marketing Act of 1937, 49 Stat. 750, as

amended 50 Stat. 246. Further, plaintiffs ask the court to enjoin state officers from enforcing the statute.

On these constitutional issues plaintiffs have the burden of proof. "It is a salutary principle of judicial decision, long emphasized and followed by this court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, ..." *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584.

The record in this case shows that plaintiffs have failed to carry their burden of proof. They ask the court to strike down a state statute but have failed to produce substantial reliable evidence to support their constitutional claims. At most, the record shows that some of the West Indian varieties of avocados grown in Florida reach maturity with less than 8% oil content. But the record also shows that the West Indian varieties represent only 12% of Florida avocado production and are declining in commercial importance. Moreover, the question of the effect of [fol. 213] California's avocado maturity statute on the West Indian varieties is hypothetical because, as the record shows without contradiction, these varieties are so highly perishable that it is not commercially feasible to ship them from Florida markets to California.

The principal commercial varieties grown in Florida are hybrids, which constitute 88% of the production. Notable among the hybrids are the Lula, Booth 7 and Booth 8 varieties. The record shows that these varieties exceed 8% in oil content when mature. The California avocado maturity law is not a barrier to the marketing of Florida's hybrid varieties if they are left on the tree a sufficient length of time before picking. Indeed, some 98% of the avocados shipped by plaintiffs to California have complied with the 8% oil standard and have been freely marketed here.

Defendants urge that plaintiffs' motive in attacking the California statute is that they are anxious to pick their hybrid varieties early, before they attain 8% oil content, and rush them to the California markets when California avocado production is light and the market price is high.

On the issue of pre-emption by the Agricultural Marketing Agreement Act of 1937, and the marketing regulations governing Florida avocados issued thereunder, defendants contend that there is no conflict in either legislative pur-

pose or in federal administration between the federal regulation and state enactments.

Finally, defendants contend that the economic injury, if any, suffered by plaintiffs from the avocado maturity statute is so slight as to be almost *de minimis*. The record shows that 98% of all avocados shipped by plaintiffs to California have complied with the 8% oil standard and have [fol. 214] been marketed without interference. In the past two seasons plaintiffs appear to have abandoned all business operations in California. Plaintiffs have not met the strict test of great and immediate irreparable harm which a litigant must satisfy before a federal court will exercise its discretionary powers of equity to interfere with the enforcement of state laws. E.g., *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95.

[fol. 215] Summary of Evidence

1. Cardinal Facts

Defendants contend that the cardinal facts that emerge from the evidence in this case are:

1. "Maturity" under both Federal and California law means that the fruit has reached that stage of ripeness which will insure the completion of the ripening process after removal of the fruit from the tree. 7 C.F.R. 51.3058; Calif. Agr. C., Sec. 781(h).

2. Oil content in the avocado increases during the maturation of the fruit on the tree and is a reliable index of maturity. Tr. 44; 65; 108; 136.

3. Avocados which are picked when immature do not ripen into edible fruit but shrivel into an unsatisfactory condition. Tr. 60-61; 137; 162.

4. The state of maturity of an avocado cannot reliably be ascertained by observation. Tr. 61; 107.

5. 8% oil content is a reliable index of avocado maturity. Tr. 137; 164.

6. Avocados grown in Florida fall into two classifications: (a) the early or West Indian varieties, and (b) the late or hybrid varieties. Tr. 47. The West Indian varieties

of commercial importance constitute 12.17% of the Florida crop; the remaining hybrid varieties constitute 87.83% of the crop. Shipments, 1959-1960 season, defendants' exhibit E in evidence.[1] These West Indian varieties are [fol. 216] lessening in volume, having dropped from 20.2% of the total in the 1955-1956 season to 12.17% as in the 1959-1960 season. Defendants' exhibit E in evidence.

7. The West Indian varieties do not, generally, attain 8% oil content at maturity. Tr. 45. The hybrid varieties attain a maximum of 15 to 20% at maturity. Tr. 46.

8. The West Indian varieties have such poor shipping qualities and short retail store "shelf-life" that it would not be commercially feasible to market them across the continent in California, even in the absence of the 8% oil content statute. Tr. 164-165; 177-179.

9. The most attractive period for shipping to California avocados are the months of September, October and November when California production is at its lowest and market prices are the highest. Tr. 162; Dep. Tr. 230-231.

10. Plaintiffs have successfully marketed over 98% of all avocados which they have shipped to California from Florida. Plaintiffs' exhibits 17, 19, 20, 21 and 8. Those few avocados found to contain less than 8% oil content were shipments made early in the marketing seasons. Plaintiffs' exhibits 17 and 21 for identification. All shipments made in the months of December and January passed the 8% oil test and were freely marketed in California, with [fol. 217] only one exception, a shipment on December 8,

[1] The varieties Fuchs, Pollock, Simmonds, Hardee, Nader, Trapp, Waldin, Peterson, Pinelli, Tonnage and Fairchild were identified as West Indian varieties. Dep. Tr. 154, 164, referring to plaintiffs' exhibit 9 for identification. Because of lessening commercial importance of the varieties Pollock and Pinelli which were listed in the 1955-1956 season were not named in the 1959-1960 tabulation but were included in the 26 varieties and seedlings constituting 4.27% of total volume in the 1959-1960 season. Defendants' exhibit E in evidence. In calculating the percentage figure for the West Indian varieties, it was assumed that these 26 unlisted varieties and the seedling varieties would distribute the same as did the named varieties.

1955. Dep. Tr. 229-230; plaintiffs' exhibits 17, 21 for identification.

[fol. 218] Testimony of Paul L. Harding

Plaintiffs' only witness at the trial was Paul L. Harding, Supervisory Plant Physiologist, United States Horticultural Field Station, Orlando, Florida.

The material portions of his testimony are:

1. *Concept of maturity.* In the horticultural sense, the fruit is mature if after picking it will soften and become palatable; a fruit that is picked before maturity will not soften properly but will shrivel. Tr. 53-54.

2. *Oil as a measure of maturity.* Harding testified, in response to a question from Judge Halbert, that oil could be used as a yardstick of avocado maturity, although he felt that there should be different oil standards for different varieties. Tr. 65. Harding thereby conceded a basic point, i.e., that oil can be used as a measure of avocado maturity. His earlier testimony was, however, contradictory. He testified that oil content was not directly related to palatability and that palatability embraced maturity. Tr. 43. On cross-examination, Harding seemed to contradict himself further when he testified that he disagreed with the following published statement by A. L. Stahl:

> "The fact content seems to be the best indication of maturity of the avocado. This can be very readily correlated with the maturity of the fruit." Tr. 76.

Harding acknowledged that Stahl was an authority on Florida avocados and that he had read Stahl's publication, "Avocado Production in Florida," published in 1942. Tr. 70.

3. *Oil content of varieties of avocados grown in Florida.* Harding's testimony is less than clear and precise on the specifics of varieties of avocados grown in Florida commercially. He testified that the oil content of varieties [fol. 219] grown in Florida ranges from 3 to 20% at maturity. Tr. 48-49. The West Indian varieties are low on oil content. Tr. 45. Other varieties, hybrid and Guatemalan,

have the higher oil content. Tr. 48-49. They are marketable and palatable at 15 to 20%. Tr. 46.

4. While Harding was not qualified as an avocado marketing expert, he testified that 69% of the Florida avocado production would reach 8% oil content if left on the tree a sufficient length of time. Tr. 91. This delay in picking simply affects the time when the growers get their money. Tr. 92.

5. *Shipping qualities and shelf life of West Indian varieties grown in Florida.* Harding testified that the low oil content West Indian varieties soften more quickly after picking than the high oil content hybrid varieties. Tr. 71-72. The shelf life (the period in which the fruit is held at the retail level) is shorter for the West Indian varieties, and therefore the fruit must be moved to market faster and more precaution taken to avoid spoilage. Tr. 72.

Harding's testimony may be summed up as follows: Avocado maturity can be measured by oil content. West Indian varieties seldom reach 8% oil content; hybrid varieties do reach 8% oil if left on the trees a sufficient length of time. West Indian varieties soften faster and therefore must be marketed more quickly than hybrid varieties.

One final comment on Harding as a witness. His testimony on the oil content of Florida avocados is of questionable reliability and entitled to little, if any, weight. His testimony was not based upon oil tests made at the U.S. Horticultural Field Station at Orlando where he is supervisory plant physiologist. Tr. 2. Rather, the oil tests were [fol. 220] made at the University of Florida Sub-tropical Experiment Station at Homestead, Florida, Tr. 8-10, which is not even an agency of the United States Government or its Department of Agriculture. In his testimony and opinions Harding relied on the research done by a Roy W. Harkness at the Sub-tropical Experiment Station. Tr. 96-97. Defendants submit that Harkness rather than Harding should have been plaintiffs' principal witness on oil content in Florida avocados. Rather than produce Harkness as a witness before the court, plaintiffs have offered his testimony in deposition form. Dep. Tr. 92; 156. Defendants will hereafter set forth the basis for their objections to the admissibility of the Harkness deposition. Further, de-

fendants will make an offer of proof that the University of Florida Sub-tropical Experiment Station used faulty methods of oil testing that makes the results of its tests unreliable as evidence.

[fol. 221]

Defendants' Objections to Plaintiffs' Offer to Introduce Depositions and Exhibits in Evidence

I. Defendants Have Reserved Objection to Plaintiffs' Evidence.

At the trial February 7, 1961, plaintiffs offered in evidence (without reading) the 305-page transcript of the depositions of plaintiffs' witnesses David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty, and R. M. Winbush. Tr. 29. Rule 26 (f), Federal Rules of Civil Procedure. Also offered in evidence were the exhibits attached to the depositions. Tr. 29. Defendants immediately objected and asked that the depositions be read in order that objection could be made statement by statement and witness by witness. Tr. 29. Defendants renewed their objection at the completion of the trial. Tr. 189. All of defendants' objections were reserved pending the filing of briefs. Tr. 29, 189-190.

Plaintiffs also offered in evidence plaintiffs' exhibits 23 to 26 for identification. Tr. 30, 37, 40, 69. The court, on its own motion, sustained an objection to Exhibit 23 for identification on the ground of relevancy and reserved ruling on the admissibility of Exhibits 24, 25 and 26 for identification. Tr. 31, 32, 69.

The transcript of the trial shows that plaintiffs' exhibits 1 to 23 were marked for identification only. Tr. i; 29.

Plaintiffs argue that the transcript of deposition and plaintiffs' exhibits 1 to 23 for identification became "parts of the record of the case" because defendants referred to the transcript and exhibits in their motion to dismiss. Plfs.' Br. 45. However, there was no evidence taken nor witnesses sworn at the time of oral argument on the motion, nor did either party offer such proof. In moving to dismiss, [fol. 222] defendants urged that the bill of complaint, viewed in light of the depositions of plaintiffs' own witnesses on the extent of their economic injury, failed to show a case within the equity jurisdiction of the court. Compare *Spiel-*

man Motor Co. v. *Dodge*, 295 U.S. 89, 91. Defendants thus accepted the allegations of the complaint and portions of the depositions for the limited purpose of the motion to dismiss only. By filing the motion, defendants did not agree to open the floodgates, at the trial on the merits, to the admission into evidence of all the depositions taken by plaintiff, or any portion of them. Plaintiffs' substantive case, as contrasted to the sufficiency of their pleadings, was first presented to the court at the trial, February 7 and 8, 1961.

No authority has been cited by plaintiffs, nor can authority be found, to support the proposition that a litigant waives the benefits of the rules of evidence by filing a motion to dismiss.

The stipulation of the parties, through their counsel of record, dated January 9, 1958, for the taking of depositions provided:

> "... that said depositions when taken may be read and used in evidence in said cause by either party on any trial thereof or proceeding therein *subject to the same objections and exceptions as if the said witnesses were personally present on the stand*, . . . " (Emphasis added).

Stipulation dated January 9, 1958, attached to Transcript of Deposition, filed herein March 14, 1958. Defendants reserved this right of objection by raising appropriate objection at the trial to the admission of the depositions in evidence without reading. Tr. 29, 31-32, 69, 189.

[fol. 223] Similarly, defendants have never waived provisions of Rule 26 (e), Federal Rules of Civil Procedure, which provides that " . . . objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence of the witness were then present and testifying." Compare Rule 33(c)(1), Federal Rules of Civil Procedure.

Thus, if defendants' objections are well taken, the plaintiffs' depositions and exhibits should not be received in evidence. *Los Angeles D. & Mtg. Exch.* v. *Securities & E. Comm.* (9 Cir.), 264 F.2d 199. In this case counsel for

plaintiffs moved at the trial "that the deposition of Charles W. Cannon . . . shall be considered in evidence on behalf of the [Plaintiff Securities and Exchange] Commission." Over objection of defendants the depositions were received in evidence. On appeal, the judgment was reversed, the Court of Appeals for the Ninth Circuit stating that "defendants were entitled to make their objections to many of the questions asked on this deposition, and to have the court in an intelligent and orderly manner. This right was taken from defendants by the court's ruling." 264 F.2d 199, 213.

Plaintiffs argue that in a case heard without a jury "there could be little profit in discussing admissibility of evidence rather than its probative force." Plfs.' Br. 47. Conceding that the court presumably would reject inadmissible or nonrelevant evidence in reaching its decision, this presumption does not convert inadmissible evidence into admissible evidence under the Federal Rules of Civil Procedure.

[fol. 224]

II. The Deposition of Roy Harkness and Plaintiffs' Exhibit 16 for Identification Should Be Excluded From Evidence.

Plaintiffs' Exhibit 16 for identification consists of numerous photostats setting forth avocado oil test determinations made at the University of Florida Sub-Tropical Experiment Station, at Homestead, Florida. Dep. Tr. 93-100. Tests were made by a Mrs. McKee and a Mrs. Kelp. Dep. Tr. 123. The witness Harkness was present during only a few of these tests. Dep. Tr. 123. Defendants object to the introduction of this exhibit into evidence on the grounds (1) that there has been no foundation laid showing the accuracy of the oil testing method used, (2) that the exhibit is irrelevant to the issues in this case since no foundation is laid showing that the avocados tested were mature edible avocados, and (3) that the exhibit contains inadmissible hearsay.

Plaintiffs' witness Roy W. Harkness testified that a series of oil content analyses were made on Florida avocados at plaintiffs' request. Dep. Tr. 94-95; 108. These analyses were made out of court and without notice to defendants. This class of experimental evidence therefore should be received with caution since its use allows a party to manu-

facture evidence in its own behalf. The objection here raised is to admissibility. "Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful." *Hesler* v. *State*, 52 Fla. 30, 42 [fol. 225] So. 692, 695. Similarly in *McLendon* v. *State*, 90 Fla. 272, 105 So. 406, 408, the court stated: "Evidence of this kind is not favored by the courts, and should be received with caution. It may be properly admitted only when the accuracy, precision, and similarity of conditions and circumstances, so essential in such matters, have been preserved."

Plaintiffs' Exhibit 16 for identification consists of oil tests made on Florida orchard-run avocados from July 6, 1953, through January 16, 1957. See testing dates, Plfs'. Ex. 16 for ident.; Dep. Tr. 113. On direct examination, Mr. Harkness testified:

> "Q. What method did you use to test the oil content?
>
> "A. We used exactly the method used in California, with the hallowax oil and the shaker bomb.
>
> "Q. What equipment did you use?
>
> "A. We used the shaker bomb, and we used the refractometer for getting the refractive index, and also miscellaneous laboratory equipment." Dep. Tr. 95-96.

However, on cross-examination, Mr. Harkness admitted that a method *other* than the prescribed California oil test had been used:

> "Q. Doctor, in your oil tests, which appear to have been made from 1953 to date, what type of oil tests did you utilize?
>
> "A. It was essentially the method used in California. *We modified the method slightly, so as to avoid using the shaker machine which they use.* (Emphasis added.)
>
> * * *
>
> [fol. 226] "Q. Doctor, in making these tests will you describe for me the various steps that you utilize from

the time the fruit enters your laboratory until you finally make your final rating?

"A. . . . .

"Q. . . . .

"A. We weigh out a five-gram sample of the fruit. We obtain that sample by means of a core bar. . . . We put that in a jar, a Waring blendor, and add five millimeters of hallowax oil and two hundred millimeters of water. . . . " Dep. Tr. 146.

* * *

"Q. Would you describe this Waring blendor?

"A. It is an ordinary household mixer, along with a quart jar on a little motor placed on a stand.

"Q. Is the Waring blendor a standard brand?

"A. Yes." Dep. Tr. 147.

The ball-grinder oil test used in California has been standardized against the ether extraction method and its validity thus assured.[2] See Bulletin Calif. Dept. of Agriculture, Vol. XLIV, No. 1, p. 1, and 3 Calif. Adm. Code 1397.5, lodged with the court, and attached as Exhibits A and B hereto. Tr. 130. No such showing has been made regarding the Waring blendor technique used at the experiment station.

The qualification of a witness in a federal district court to testify as an expert is tested by the law wherein the action is brought. *Diesbourg* v. *Hazel-Atlas Glass Co.* (3 Cir.), [fol. 227] 176 F.2d 410, 413.[2] Under California law, a foundation must be laid prior to the admission of this type of expert evidence by the asking of questions which disclose the source and reliability of the knowledge of the witness. See *Long* v. *Cal-Western States Life Ins. Co.*, 43 Cal.2d 871, 882, experiments of ballistics expert excluded as speculative; compare *People* v. *Ely*, 203 Cal. 628, 633; *People* v. *Roberts*, 40 Cal.2d 483, 490. There is no presumption that a witness is an expert or that his experiments are valid and it is incumbent upon the party offering the witness to show that he possesses the necessary skill and that

[2] Plaintiffs do not challenge the official oil testing method used by California enforcement officers. Tr. 110.

his testimony is probative. *Tully* v. *Mahoning Express Co., Inc.*, 161 Ohio St. 487, 119 N.E.2d 831, 833.

The reliability of these oil tests is not established by plaintiffs. In the absence of a showing that the Waring blendor test method used at the experiment station is as effective as the ball-grinder method in extracting all of the oil from the tested avocados, the tests cannot be of probative value. No such showing has been made by plaintiffs. For all that their evidence shows, the Waring blendor method may be totally unreliable and may extract only a portion of oil from the avocados tested.

Plaintiffs' memorandum prior to trial, page four, has represented that " . . . only avocados that have attained specified weight (or size measured by diameter) may be picked;" under the federal marketing regulations. Plaintiffs fail to show that any single avocado tested at the experiment station would have met these standards. Most tests were made in years prior to the promulgation of the federal regulation in June of 1954 and are irrelevant. 7 C.F.R. Part 969. With respect to the avocados tested after June of 1954, only average weights are given. Neither the weights [fol. 228] nor the diameters of any individual fruit are given. Thus it is impossible to ascertain from the exhibit whether any given fruit would have met the federal diameter-size requirements. Similarly, there is no showing that the fruit met the federal "maturity" requirements. See definition of maturity for Florida avocados in 7 C.F.R. 51.3058:

> "Mature means that the avocado has reached a stage of growth which will insure a proper completion of the ripening process."

With respect to the fruit tested at the experiment station (i.e. fruit listed on page 28 of Exhibit 16), the witness Harkness was asked: " . . . whether any of that fruit was covered by a Federal-State Inspection Certificate?"

> "A. No, not when it was brought to us, that is, insofar as I know.
>
> "Q. Then so far as you know it had never been inspected?
>
> "A. That is right."

In many instances Harkness had no personal knowledge of the source of the fruit. Upon being asked if he had any personal knowledge of the fruit listed on page 78 of Exhibit 16, he stated:

> "Q. Then, is it true that as to the samples shown on that page, Dr. Harkness, that the only knowledge you would have would be knowledge given to you or your associates at the time of the delivery of the fruit to the laboratory?
>
> "A. Yes." Dep. Tr. 120.

It follows that the entries in Exhibit 16 showing date of picking and the owner of the orchard are inadmissible hearsay.

[fol. 229] In all events, the oil test results in question are irrelevant to any issue in this case. Commingled in the avocados tested were: (1) those picked in test orchards maintained at the experiment station, and (2) avocados usually picked in commercial orchards. Dep. Tr. 109-120. Since the fruit tested came from the orchard and not from the packing house, the fruit tested was not representative of the graded, sized and inspected fruit which plaintiffs might actually market. Low oil tests could easily be secured by simply supplying the experiment station with green (immature) fruit which plaintiffs had no intention of marketing. No showing is made as to the state of maturity of the fruit tested.

Plaintiffs' Exhibit 16 for identification should be excluded from evidence, (1) no foundation has been laid showing the accuracy of the oil test method used at the experiment station, (2) the contents of the exhibit are based on inadmissible hearsay, and (3) the tests are irrelevant since only green fruit may have been tested. Moreover, since the testimony of the witness is predicated upon these unverified oil tests, his deposition should likewise be excluded from evidence.

The Harkness deposition should be excluded for a further reason. Plaintiffs made no showing at the trial that the witness was a greater distance away than 100 miles. Rule 26 (d)(3), Federal Rules of Civil Procedure; compare *Mercado* v. *United States* (2 Cir.), 184 F.2d 24, 26-27.

[fol. 230]

III. If the Harkness Deposition and Exhibit 16 for Identification Are Received Into Evidence, Defendants' Offer to Prove That the Oil Testing Method Used by the University of Florida Sub-Tropical Experiment Station Is Invalid.

At the conclusion of the hearing held February 8, 1961, defendants renewed their objections to admitting the contents of plaintiffs' depositions into evidence without their being read. Tr. 190. Defendants represented that they would have refuting evidence to introduce "If any of the matters in the deposition are to be admitted into the record." Tr. 190. The court ruled that it would grant another hearing if made necessary by the consideration of the contents of plaintiffs' depositions. Tr. 190. Defendants herewith make their offer of proof in order that the court determine the necessity of holding another hearing.

Defendants offer to prove through chemists A. J. Bingham, J. B. LaClair, Frederick L. Delano, and Archie Shannon, that the oil testing method used at the University of Florida Sub-Tropical Experiment Station at Homestead, Florida, relied upon by the plaintiffs is invalid in two respects: (1) The test fails to recover all of the available oils in the avocado fruit tested and, (2) produces erratic test results.

Specifically, the defendants offer to prove: That two flats of avocados were purchased from the packing house owned and operated by the plaintiff South Florida Growers Association at Goulds, Florida; that these flats were purchased November 12, 1958, and December 4, 1958, and were thereafter shipped air express from Miami, Florida, to Sacramento, California. Upon arrival in California, [fol. 231] they were immediately tested for oil content. That each of the 32 hard fruit in the flats was cut in halves. One half was tested for oil content by qualified chemists at the Chemistry Laboratory, Department of Agriculture, State of California, using the testing method devised at the University of Florida Sub-Tropical Experiment Station. Dep. Tr. 146-147. This method will hereafter be called the "Waring blendor" method. The other half of each

of the 32 avocados was also tested for oil content using the oil test method prescribed by California regulations. 3 Calif. Admin. Code 1397.5; Bulletin, Calif. Dept. of Agriculture, Vol. XLIV, No. 1. This method will hereafter be designated the "ball-grinder" method.

The main difference between the two methods of oil extraction consists in the use of different equipment. The University of Florida Sub-Tropical Experiment Station used a Waring blendor, which utilizes sharp whirling blades. Dep. Tr. 146; Exhibit C attached hereto. When applied to the avocado fruit pulp, these rapidly whirling blades produce a shearing action. However, after partial maceration, the whirling blades fail to break all of the pulp cells containing oil because of the minute edge presented to the cells by the whirling blades.

The California test method uses a "ball-grinder" in which the avocado fruit pulp is placed in a steel cylinder which contains two steel balls. As the cylinder is powerfully jerked back and forth, the steel balls interact with each other and the cylinder walls crush the avocado pulp into a fine paste. This equipment is illustrated in Exhibit D hereto. Experiment has shown that the large area of contact between the cylinder and between the two balls, destroys the avocado pulp cell structure and renders available for measurement all of the oil in the avocado. The [fol. 232] test certificates, and a summary thereof, are annexed hereto as Exhibit E. These paired tests show that the Florida "Waring blendor" oil test method consistently fails to measure all of the oil in the avocado fruit tested. The average of the 32 tests shows a failure to remove 2.9 percent points of oil.[3] Exhibit F hereto.

Appendix II to plaintiffs' brief consists of a summary of plaintiffs' Exhibit 16 for identification, and shows the results of oil tests made at the University of Florida Sub-Tropical Experiment Station, Homestead, Florida. This summary would read as follows if the average error of 2.9 percentage points were considered:

[3] Evidence of chemical tests made by the two methods on California avocados will also be introduced.

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Variety	Period of Testing	No. of Tests	Oil Test	% Crop 1959-60. Defendants' Exhibit E in Evidence.
Pollock	1953:			
	July 6 to August 12	74	4.5– 6.2	—*
Waldin	1953:			
	July 27 to September 22	75	5.0– 9.0	9.15%
	1954:			
	July 20 to September 8	23	6.1– 7.9	
Booth 8	1953:			
	August 12 to September 30	53	5.6– 8.7	27.24%
	October 1 to October 30	24	7.3– 9.7	
	November 7 to November 25	28	7.6–11.3	
	1954:			
	December 3 and December 16	3	11.2–12.2, 11.7	
	August 16 to September 30	31	6.1– 9.1	
	October 5 to November 10	16	8.0–10.0	
Nia	1953:			
	August 12 to September 30	127	5.2–10.8	20.60%
	October 1 to October 30	91	7.8–13.9	
	November 2 to November 30	101	8.3–16.0	
	December 2 to January 13	88	7.4–16.0	
	1954:			
	August 24 to September 28	30	5.8– 8.6	
	October 4 to October 29	85	7.6–12.1	
	November 1 to November 30	44	8.6–12.5	
	December 6 to January 12	21	10.0–15.8	
Booth 7	1953:			
	September 9 to October 14	27	6.1– 9.8	12.95%
	October 16 to October 30	49	7.1–11.2	
	November 2 to November 23	60	7.0–14.0	
	December 1 to December 16	34	9.3–14.9	

* Production too low to be listed by name.

Variety	Period of Testing	No. of Tests	Oil Test	
	1954:			
	September 15 to October 12	10	6.7– 9.4	
	November 2 to November 30	22	7.0–12.7	
	December 6 to December 14	6	7.9–13.8	
Hickson	1953:			
	September 29 to October 30	10	8.7–10.3	4.36
	November 12 to December 4	6	9.8–12.9	
	1954:			
	September 22 to November 10	13	9.6–12.5	
Collinson	1954:			
	October 13	1	10.1	1.16
Booth 3	1953:			
	October 6 to November 12	10	6.9–11.2	2.51
	November 16 to December 31	8	9.6–13.4	
	1954:			
	November 10 to December 1	8	10.3–12.9	
[fol. 234]				
Taylor	1953:			
	October 22 to November 18	21	9.0–12.8	1.53
	November 24 to January 13	18	10.3–14.3	
	1954:			
	November 1 to December 14	16	10.0–13.1	
Booth 1	1953:			
	October 22 to December 16	9	10.4–13.8	3.32
	1954:			
	November 1 to December 14	11	10.9–14.6	
			Total percentage	83.34

[fol. 235] Thus, for example, the first avocado tested on Exhibit E shows a 7% oil content when analyzed by the Florida "Waring blendor" method. This same fruit when tested by the California "ball-grinder" method produced 11% oil content. Had plaintiffs received only the oil analysis made by the Florida "Waring blendor" method, they would conclude that the avocado fruit, which the sample represented, would fail to meet the California 8% oil requirement. In fact, however, the fruit would have met the California standard by a wide margin.

Even more serious are the erratic results produced by the Florida "Waring blendor" method of testing. The 32 fruit tested under the Florida method showed a variation from the ball-grinder results ranging from 9.9% to 41%. It is noted that plaintiffs' witness Harkness complained that avocados tested at the Florida Experiment Station, when picked from the same tree at the same time, were found to contain an unexplained range in oil content. Dep. Tr. 104. The explanation lies not only in the innate difference in the fruit, but also to the defects in the oil test method devised at the Homestead Experiment Station.

On cross-examination, plaintiffs' witness Harding was asked if he agreed with the findings of Dr. Arthur L. Stahl, Associate Horticulturist, University of Florida Experiment Station, Gainsville, Florida. Tr. 70-71. Stahl found that the oil content of Florida avocados during the period of commercial maturity were as follows (Tr. 70-71):

Florida Variety	Oil Content Range
Booth 7	10 to 14%
Booth 8	8 to 12%
Lula	12 to 15%

[fol. 236] Dr. Harding answered that the oil content tests he relied upon showed figures lower than those stated by Dr. Stahl. Tr. 71. The explanation, again, lies in the fact that Harding relied on the erroneous oil tests made at the University of Florida Sub-Tropical Experiment Station at Homestead, Florida. Tr. 10, 97. It may be inferred that Dr. Harding would agree with the figures given by Dr. Stahl if a valid method of oil testing had been used.

Plaintiffs have exaggerated this error in still another respect. Plaintiffs obtained the avocados for testing at the Sub-Tropical Experiment Station from the orchards and not from the packed, graded and sized fruit at the packing house. Dep. Tr. 112, 197-198, 268. By this error in fruit sampling plaintiffs increased the factor of error caused by the inaccurate oil tests obtained by plaintiffs.

Statistical inferences are inductive in that they ascribe certain characteristics to a large collection of objects from a knowledge of these same characteristics derived from only a few of the objects. The large collection of objects studied is called the universe. The few objects selected from the universe for study are called the samples. In the instant case, the universe would be the orchard from which the samples were taken. If the samples were truly random and were large enough, the characteristics of the samples could reasonably be attributed to the fruit in the orchard. However, the characteristics of the samples tested by the plaintiff cannot be attributed to the packed, graded, and sized fruit at the packing house since the latter universe was never sampled. For example, an oil test taken of a diseased "cull" avocado picked in the orchard would not be representative of the prime fruit which had passed through the [fol. 237] selective packing house procedures. Dep. Tr. 215-216. It is probable that such cull avocados would never have been hauled to the packing house, or if hauled they would have been graded out. Similarly, a small avocado from the orchard would not be representative of a box of larger graded and sized fruit, since the larger avocados probably would have had a longer growing period on the tree, and be more mature. Dep. Tr. 151.

To summarize, plaintiffs' attack on the California oil test statute stems from the erroneous results of an invalid oil test technique utilized in Florida, together with a faulty sampling procedure which caused plaintiffs to test fruit which were not representative of graded and packed fruit at the packing house.

[fol. 238]

IV. Further Objection to Plaintiffs' Evidence.

A. Plaintiffs' Exhibits 4, 5, 7, 8, 10 and 11 for Identification.

Defendants object to the introduction into evidence of plaintiffs' exhibits 4, 5, 7, 8, 10 and 11 for identification on the grounds that such exhibits constitute (1) inadmissible secondary evidence of the contents of other written documents not produced in court, (2) are not the best evidence of the contents of such other documents, (3) are inadmissible summaries, and (4) are inadmissible hearsay.

Plaintiffs' exhibits 4, 5, 7, 8, 10 and 11 for identification consist of summaries of Florida avocado shipments. These exhibits are based on copies of inspection certificates purportedly issued by the Agricultural Marketing Service, United Sta' Department of Agriculture, and the citrus and vegetable inspection division, Florida Department of Agriculture. Dep. Tr. 11, 36-37, 14-16, 17-20, 37, 26, 16-25, 28. Neither the original certificates nor authenticated copies were marked for identification at the time of the taking of the deposition, or otherwise made available to defendants and were never produced in court.

The witness Biggar testified that he had prepared the exhibits from copies of inspection certificates furnished to the Avocado Administrative Committee. Dep. Tr. 11, 14-16, 17-18, 25, 26, 37-38. Exhibit 4 for identification is "substantially" correct. Dep. Tr. 13-4. The witness stated that he had no personal knowledge regarding the preparation of the certificates. Dep. Tr. 36-37, 14-25, 26, 38. Information set forth in Plaintiffs' Exhibit 5 for identification came from a letter (not in evidence) from the federal [fol. 239] Department of Agriculture and from estimates supplied by Calavo Growers of California, a private marketing cooperative. Dep. Tr. 14-16; Tr. 175-176. The exhibits therefore constitute summaries of the contents of hearsay documents, and are not the best evidence.

In particular, the exhibits are not business records under 28 U.S.C. 1732. The purpose of this statute is to create an exception to the hearsay rule. Its basis was to facilitate admission of systematically entered records, which experience had shown to be trustworthy as routine reflec-

tions of day-to-day operations of business and to permit the introduction of these records without identifying, locating and calling as witnesses those who kept the records (*Palmer* v. *Hoffman*, 318 U.S. 109, 113-114). The statute does not cover records which are kept outside the regular course of business, or records kept by persons outside the business. Id. at 114.

The United States Supreme Court, in *Palmer* v. *Hoffman*, *supra*, at 114, after holding that the regular recording of events having nothing to do with the operation of the business would not qualify under the business records act, stated: "Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability [citation omitted] acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act [former 28 U.S.C. 695, now 28 U.S.C. 1732(a)] and their historic meaning. If the Act is to be regarded to apply not only to a 'regular course' of business but also to any 'regular course' of conduct which may have some relationship to the business, Congress, not this Court, must extend it. Such a major change which opens wide the door to avoidance of cross-[fol. 240] examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the very circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met."

The witness Biggar identified himself as Manager of the Avocado Administrative Committee, a body composed of Florida producers and handlers of avocados. Dep. Tr. 4; 7 C.F.R. 969.20. He further stated that the inspection service issuing the inspection certificates did not come within the jurisdiction of the Avocado Administrative Committee and that he had no personal control over the inspection of avocados. Dep. Tr. pp. 34, 35. The "business" of the committee is to make recommendations to the Secretary of Agriculture, not to inspect avocados. 7 C.F.R. 969.50.

The inspection certificates (otherwise unidentified) on which the summaries were based, were not prepared or made under the supervision or control of any employee of the

Avocado Administrative Committee. Dept. Tr. 35. Therefore, they are not records whose trustworthiness has been established by the testimony of a person who systematically kept or supervised the preparation of such records. The witness Biggar could only testify to their receipt and retention and not to the trustworthiness of their contents. No foundation has been laid either authenticating the inspection certificates or establishing that they were made in the regular course of a business under circumstances giving indicia of reliability. It follows that the exhibits in question, which are summaries of the contents of hearsay documents, are not business records reflecting transactions occurring in the course of the business of the Avocado Ad-[fol. 241] ministrative Committee. They are not therefore within the scope of 28 U.S.C. 1732.

Neither are these exhibits official records under 28 U.S.C. 1733. This statute provides:

> "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> "(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

Defendants suggest that the Avocado Administrative Committee is not a federal agency within this statute. The committee consists of nine members selected by the Secretary of Agriculture. 7 C.F.R. 969.20. Five are producers of Florida avocados and four are handlers of Florida avocados. 7 C.F.R. 969.20. Their primary function is to recommend proposed administrative regulations to the federal Secretary of Agriculture. 7 C.F.R. 969.50. The committee represents and acts on behalf of the Florida avocado industry, not the federal government. Tr. 64. Its records therefore are not official records within 28 U.S.C. 1733.

Further, the "transactions" in question were the inspections made by an agency other than the Avocado Adminis-

trative Committee. The "memoranda" recording such a transaction would be the inspection certificate itself, not a summary based on such certificates. While the inspection certificates themselves, if authenticated, might be official [fol. 242] records, the summaries in question are not.

In addition, the presumption of impartiality attendant to official records is lacking here. The summaries were prepared by the witness Biggar, a pleasure employee of the administrative committee. Dep. Tr. 70. The committee itself is composed of growers and handlers of Florida avocados. 7 C.F.R. 969.20. Among these members were Harold Kendall and Fred Piowaty. These men are officers in the plaintiff corporations in this case and testified for plaintiffs. Dep. Tr. 69, 158, 249. Under these circumstances the bias of the witness Biggar casts shadows on the reliability of the exhibits prepared by him. These exhibits, therefore, cannot reasonably have the indicia of reliability and impartiality required under 28 U.S.C. 1733.

Defendants also object to the admission of these exhibits into evidence for the reason that they constitute inadmissible secondary evidence of the contents of other writings. The best or superior evidence of the contents of the inspection certificates are the certificates themselves. Summaries of authenticated books and records (themselves admissible in evidence) are admissible in evidence where the books and records have been physically produced in court. The rights of the litigants are protected because the original documents can be examined, and the person making the summary questioned. In this case the original inspection certificates have never been produced, and therefore the summaries thereof are inadmissible. Thus in *In re Bell-Tone Records, Inc.*, 91 F. Supp. 642, 644, the summary prepared by an accountant based upon his examination of books and records was excluded from evidence because the original [fol. 243] books and records were not produced in court. Similarly in *Berthold-Jennings Lumber Co. v. St. Louis Ry.* (8 Cir.), 80 F.2d 32, 44, partial copies of ledgers of grain commission firms made by an accountant before destruction of the ledgers, were held inadmissible where the ledgers were not produced in court.

[fol. 244]

B. Plaintiffs' Exhibits 6, 9 and 14 for Identification.

Plaintiffs' Exhibits Nos. 6, 9 and 14 for identification consist of summaries of federal regulations issued successively during the 1956-1957, 1957-1958, Florida avocado shipping seasons. Dep. Tr. 17, 20, 73. These summaries were prepared by the witness David M. Biggars, an employee of the Avocado Administrative Committee. Dep. Tr. 4, 17, 20, 23.

Defendants object to the admission into evidence of the exhibits on the grounds (1) the exhibits constitute inadmissible secondary evidence of the contents of the original regulations, and are not the best of evidence of such contents, (2) constitute inadmissible hearsay, (3) the exhibits do not constitute a written verbatim copy of the original regulations, and (4) there has been no authentication of the original regulations.

Presumably the original federal regulations, or authenticated copies, are available to plaintiffs. Since production is thus feasible, it should be required since every word and every part in the whole should be compared before the Court determines the total sense and effect that should be given it.

Plaintiffs, of course, may make appropriate reference to the regulations of the Secretary of Agriculture which are published in the Federal Register. The Court has stated that it will take judicial notice of these published regulations. This circumstance renders formal proof of the contents of the regulations unnecessary. This taking of judicial notice also reenforces defendants' argument that plaintiffs' exhibits Nos. 6, 9 and 14 constitute inadmissible hearsay summaries of the regulations in question, and should not be admitted into evidence, since alternative proof is open to plaintiffs.

[fol. 245]

C. Plaintiffs' Exhibits 12 and 13 for Identification.

Plaintiffs' Exhibits 12 and 13 for identification consist of excerpts from plaintiffs' exhibit 16 for identification, and a partial extract from unidentified regulations issued by

the Secretary of Agriculture. Dep. Tr. 30-31. Plaintiffs' witness Biggars (manager of the Avocado Administrative Committee) as a personal favor to Harold E. Kendall and Fred Piowaty, officers of plaintiff corporations, visited the University of Florida Sub-Tropical Experiment Station, Homestead, Florida, and copied onto exhibits 12 and 13 for identification portions of the records he found there. Dep. Tr. 28-29. Kendall and Piowaty were officers of plaintiff corporations, and also were members of the Avocado Administrative Committee. Dep. Tr. 158, 249, 42-43. The witness Biggars, at the time the exhibit was prepared, knew of the pendency of the lawsuit and that the exhibit could be used as an exhibit in said action by the plaintiff corporations. Dep. Tr. 41-42. Biggars admitted that he had no personal knowledge of the information he copied onto exhibits 12 and 13 for identification. Dep. Tr. 41.

Defendants object to the introduction into evidence of plaintiffs' exhibits 12 and 13 for identification on the grounds (1) that the information pertaining to oil tests is derived from exhibit 16 for identification, said exhibit 16 being inadmissible hearsay, (2) that that portion of exhibits 12 and 13 for identification which identifies the person making the request for oil content testing, and identifying the owner of the avocado grove concerned, constitutes inadmissible hearsay, and (3) that the lower portion of the exhibit constitutes inadmissible secondary evidence of the contents of the unidentified federal regulations.

[fol. 246] Plaintiffs' witness Harold E. Kendall, on cross-examination admitted that he had never personally delivered any of the avocados listed on exhibit 13 to the Sub-Tropical Experiment Station. Dep. Tr. 193-194. His personal involvement was the giving of instructions to the South Florida Growers, Inc., field superintendent, that avocados be picked and delivered to the experiment station. Dep. Tr. 194. The testimony of Kendall is the only testimony connecting the plaintiff South Florida Growers, Inc., with exhibit 13 for identification. Since Kendall's testimony in this regard is not based on personal knowledge, he is not qualified as a witness to testify thereon. Exhibit 13 itself is therefore inadmissible hearsay since its contents are identified only through the testimony of Kendall and Biggars.

Plaintiffs' witness Fred Piowaty on cross-examination similarly admitted that he had never personally delivered any of the avocados listed on exhibit 12 to the Sub-Tropical Experiment Station. Dep. Tr. 267. Nor had he personally picked any of the fruit. Dep. Tr. 268. Thus, Piowaty had no personal knowledge of the facts recited in exhibit 12, and his testimony constitutes inadmissible hearsay. Since exhibit 12 for identification rests on the hearsay testimony of Biggars and Piowaty, it too constitutes inadmissible hearsay.

Plaintiffs' exhibits 12 and 13 for identification are extrajudicial writings which are offered to prove the truth of the matters asserted. As such they constitute inadmissible hearsay. The testimony of the person preparing the document shows that it was not prepared in the course of the business of the Avocado Administrative Committee. Dep. Tr. 38-39. The title and form of this document show that it was prepared for litigation at the request of plaintiffs. Dep. Tr. 40-42. Documents prepared for litigation are not [fol. 247] admissible as business records. *Palmer* v. *Hoffman*, 318 U.S. 109, 114. It follows that exhibits 12 and 13 for identification constitute inadmissible hearsay and should be excluded from evidence.

D. Plaintiffs' Exhibit 15 for Identification.

Plaintiffs' Exhibit 15 for identification consists of bulletins issued by the Avocado Administrative Committee from May 15, 1957 to October 9, 1957. The bulletins relate recommendations made by the committee to the Federal Secretary of Agriculture. As recommendations, the bulletins have no official status and are irrelevant. If tendered to prove the contents of the actual regulations, the exhibits are inadmissible secondary evidence. The regulations themselves are the best evidence of their contents. The exhibits are similarly inadmissible if considered as summaries of federal regulations (otherwise not identified) since they would then constitute inadmissible secondary evidence of the contents of the regulations. *In re Bell Tone Records, Inc.*, 91 F.Supp. 642, 644.

E. Plaintiffs' Exhibits 17 and 21 for Identification.

Plaintiffs' Exhibits 17 and 21 for identification consist of typewritten documents headed "Avocado Shipments Barred from Sale in California." Exhibit 17 pertains to plaintiff South Florida Growers Association, Inc. Exhibit 21 pertains to plaintiff Florida Lime and Avocado Growers, Inc.

The statements in these documents, being in writing and not oral, were not made in the presence of this Court; nor were they made in the presence of the officer taking the depositions. Since these documents are being offered to prove the truth of the matter asserted, they are hearsay. [fol. 248] These documents are not within the business records exception as defined in 28 U.S.C. sec. 1732, because there is no evidence that they were "made in regular course of any business." Dep. Tr. pp. 175-180, 203-208; *U. S.* v. *Indian Trailer Corp.*, 226 F.2d 595, 599-600 (7th Cir. 1955). In particular there is no evidence that summaries of shipments rejected in California were regularly made for all shipments rejected in California. Nor is there evidence that summaries of shipments rejected in California were regularly made within a reasonable time of their dispatch or rejection.

Records prepared for litigation are not admissible as business records. *Palmer* v. *Hoffman*, 318 U.S. 109 (1943). The title and contents of these documents clearly show that they were prepared for this very litigation.

Both exhibits summarize seven groups of transactions and events, each group consisting of the shipping of certain avocados to California, the receipt of notice of noncompliance "upon test of oil content," their reshipment and eventual sale outside California, and the alleged resulting "loss," i.e., lessening of gross return. Dep. Tr. 203-206, 264-267.

Even if the ex parte claims made in plaintiffs' exhibits 17 and 21 for identification were made orally by Mr. Kendall in the presence of the officer taking his deposition, these statements would not be admissible in evidence at the trial. The witness Kendall admitted that the statements in exhibit 17 for identification were a "summary of what appears in the books and records of [his] company. . . ." Dep. Tr. 178. The witness Piowaty testified that Exhibit 21 for identification was a "summarized statement from the books and

records of [his] company. . . . " Dep. Tr. 128. Neither witness claimed, nor was shown to have, personal knowledge of the transaction reflected in these books and records. Con-
[fol. 249] sequently, neither Kendall nor Piowaty was qualified to make the statements as set forth in the exhibits, and such statements constitute inadmissible hearsay. Even had the witnesses recited the contents of these unauthenticated and unidentified records, the recitation would not be admissible in evidence because such testimony does not constitute the best evidence of the contents of such records.

Had the records, whatever they were, been offered in evidence, they would remain inadmissible hearsay unless shown to be entries made by employees of the plaintiff corporations which, in addition, met the requirements of the business records hearsay exception. 28 U.S.C. 1732. No such showing has been made. Dep. Tr. 255-256; 175-178. For example, a memorandum of a phone conversation with a west coast receiver giving an "assurance" of a sale on the west coast would not come within the business records exception. Dep. Tr. 266-267. *United States v. Indian Trailer Corp.* (7 Cir.), 226 F.2d 595, 595-600.

Defendants further object to the introduction in evidence of that part of plaintiffs' Exhibit 21 for identification which summarizes shipments made in 1955. The record shows that these shipments were made by a separate corporation, not by the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 61; 249-250; stipulation of the parties dated September 29, 1960, on file herein. Since a different corporate entity made the shipments, the witness Piowaty, an officer of Florida Lime and Avocado Growers, Inc., is not qualified to testify thereto, and such statements constitute inadmissible hearsay. This matter is irrelevant since any loss fell on the shareholders of the predecessor cooperative, not on the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 249-250.

[fol. 250]

F. Plaintiffs' Exhibit 22 for Identification

Plaintiffs' Exhibit 22 for identification is an unverified copy of a hold report form under the heading "Los Angeles County Agricultural Commissioner." Defendants object to

the introduction of the exhibit in evidence on the grounds that (1) its authenticity has not been shown, and (2) the document constitutes inadmissible hearsay.

The only testimony regarding Exhibit 22 for identification is that of witness Piowaty, Secretary of the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 249. Piowaty testified (1) that the exhibit had been procured by his "consignee in Los Angeles," and (2) that it contained a memorandum of oil tests. Dep. Tr. 258. No showing is made either establishing the authenticity of the document or identifying who made the entries thereon. Without such foundation, Exhibit 22 for identification is inadmissible hearsay. Similarly, no showing is made that the witness had first-hand knowledge of the transactions reflected in the exhibit. The witness is therefore not privileged to testify regarding the transaction, and his statements constitute inadmissible hearsay.

[fol. 251]

G. Plaintiffs' Exhibits 23, 24, 25 and 26 for Identification.

Plaintiffs' Exhibits 23, 24, 25 and 26 were marked for identification at the trial February 7 and 8, 1961. These exhibits consist of a number of treatises and one chart:

Exhibit 23 for identification:

(1) Typewritten pages entitled, "General Information on Avocado Research."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 67, 1954, entitled, "The Relation of Maturity to Quality in Florida Avocados."

(3) A collection of writings headed, "Evidence Presented at Hearings Before Secretary of Agriculture." March 8, 1954, by Paul L. Harding.

Exhibit 24 for identification:

(1) Typewritten pages entitled, "General Information on Avocado Research, 1954-1955."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 68, 1955, entitled, "Relation of Maturity of Florida Avocados to Physical Characters."

Exhibit 25 for identification:

(1) Typewritten pages entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. LXX, 1957, entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(3) Chart headed, "Some Physical and Chemical Changes in the Principal Varieties of Florida Avocados Picked Above and Below the Regulated Minimum Weight, 1955-1956."

[fol. 252] Exhibit 26 for identification:

(1) Typewritten pages entitled, "Resume of Progress of Studies on Florida Avocado Maturity" by Thurman T. Hatton, Jr.

Defendants object to the introduction in evidence of plaintiffs' Exhibits 23, 24, 25 and 26 for identification on the grounds that these exhibits constitute (1) inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) are irrelevant.

The offer into evidence of these exhibits seeks to employ testimonially controversial statements made out of court, i.e., Tr. 70-71. Since offered to prove the truth of the matter asserted, the exhibits are inadmissible hearsay. *United States* v. *Paddock*, 68 Fed. Supp. 407, 409; *Gallagher* v. *Market Street Ry.*, 67 Cal. 13, 17. No necessity is shown for plaintiffs' use of this material since plaintiff produced an expert witness in court who covered the same matters in his direct examination. Tr. 2-97.

A part of Exhibit 23 for identification consists of material apparently introduced at a hearing before the Secretary of Agriculture. The Court on its own motion excluded testimony regarding this exhibit as immaterial. Tr. 26. In addition, the exhibit constitutes inadmissible hearsay.

Plaintiffs sought to qualify Exhibits 23, 24, 25 and 26 for identification under the official records exception to the hearsay rule. Tr. 41. However, the testimony of the witness Harding established only that these exhibits were parts of the records in his custody. No showing was made that these particular exhibits (as contrasted to the original records) were books or records of account or minutes of proceedings of any department or agency of the United States. [fol. 253] U.S.C. 1733. The reprints from the publication, "Proceedings of the Florida State Horticultural Society" are not records of an agency or department of the United States. Neither are they business records. 28 U.S.C. 1732. A copy of Time Magazine could possibly be found in Mr. Harding's files. But this circumstance does not convert the magazine into an official or a business record.

Further, statements which require the exercise of judgment, the expression of opinion, and the making of conclusions are excluded from evidence, even though contained in official records. *Pruett* v. *Burr*, 118 Cal.App.2d 188, 200-201. Such declarations are excluded because there is no opportunity to cross-examine the declarant to test his knowledge, veracity and demeanor. Similarly, such statements of fact are inadmissible where the declarant obtained the information from third parties. Compare *Olander* v. *United States* (9 Cir.), 210 F.2d 795, 802.

A further objection appears in that the material included in the chart, included as part of Exhibit 25 for identification, consists of a summary of records in the office of Mr. Harding. Tr. 18. However, only a portion of the original records were produced in Court. Tr. 25. Since the original records were never produced in Court, the summaries thereof are inadmissible. *Berthold-Jennings Lumber Co.* v. *St. Louis Ry.* (8 Cir.), 8 F.2d 32, 44; *In re Bell Tone Records, Inc.*, 91 F.Supp. 642, 644.

If it be assumed that the palatability test results shown on the chart are the same tests described in the testimony of Mr. Harding, then the exhibits constitute inadmissible hearsay. Tr. 78. Tables of data showing the responses of members of a taste panel to food presented to them con- [fol. 254] stitute hearsay evidence. The original scoring by members of the taste panel were made outside of the courtroom. The testimony in the courtroom is merely a repeating of the previous extra-judicial statements. Since the data is offered to prove the truth of the matter asserted, it constitutes inadmissible hearsay. Stated differently, the witness has no personal knowledge of the facts except as narrated to him. He is therefore not qualified to testify on the matter. The declarants are the members of the panel who are unavailable for cross-examination. Defendants therefore have no opportunity to test the sincerity, narrative ability, perception or memory of the declarants.

This class of evidence has been rejected by the courts. In *United States* v. *International Harvester Co.*, 274 U.S. 693, the plaintiff had introduced into evidence over objection a report of the Federal Trade Commission which in turn was based on data furnished it by various manufacturers of agricultural implements concerning their cost, profits and business operations. In holding that the trial court erred in admitting this report in evidence, the court stated: "But it is entirely plain that to treat the statements in this report—based upon an ex parte investigation . . . —as constituting in themselves substantive evidence upon the questions of fact here involved violates the fundamental rules of evidence entitling the parties to a trial on issues of fact, not upon hearsay, but upon the testimony of persons having first-hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination" (*United States* v. *International Harvester Co.*, 274 U.S. 693, 703). Similarly, the Delaware Supreme Court in *Coca-Cola Co.* v. *Nehi Corporation*, 27 Del. 318, 36 Atl.2d 156, 160, held inadmissible a word association test conducted by professors of psychology in the college classroom, [fol. 255] the matter being hearsay and the declarant not being subject to cross-examination. In *Elgin National*

Watch Co. v. *Elgin Clock Co.*, 26 Fed.2d 376, the plaintiff offered in evidence the affidavit of a member of a New York advertising firm giving his opinion regarding the meaning of the word "Elgin" to retail jewelers, said affidavit being based on the answers to 2000 questionnaires distributed to retail jewelers. The evidence was rejected as hearsay, the court saying: "The affidavit submitted for filing is one based, not upon personal knowledge of the affiant or upon facts admitted in evidence, but, on the contrary, is predicated solely on the unverified statements or opinions of persons not called as witnesses." 25 Fed.2d 376, 378.

Plaintiffs are not helped by the circumstance that the witness in question may be an "expert" on food tasting. In limited cases an expert may express an opinion on matters within his special competence. But in such case the witness must base his opinion (1) on actual personal observation or (2) on facts in evidence which are stated in a hypothetical question. 2 Wigmore on Evidence [3d ed.] secs. 674-682. Neither condition is satisfied where the knowledge of the witness is derived from statements of members of the taste panel.

Lastly, these exhibits are irrelevant. The validity of the federal regulations is not in issue.

[fol. 256]

H. Depositions of Kendall, Piowaty, Biggars and Wimbish

Defendants object to the introduction in evidence of the depositions of plaintiffs' witnesses Harold E. Kendall, Fred Piowaty, David M. Biggars and R. M. Wimbish. Kendall is President of the plaintiff South Florida Growers, Inc. and Piowaty is Secretary of the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 158, 249. Their depositions, in effect, are the depositions of the plaintiff corporations.

Rule 26(d)(3), Federal Rules of Civil Procedure, provides:

> "(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, . . . unless it appears that the *absence* of the

witness was procured by the party offering the deposition;" (Emphasis added).

The record is silent as to why these witnesses did not attend the trial.

Defendants suggest that the quoted language, fairly read, precludes a party from using his own deposition as evidence at the trial unless it is shown that he could not be present at the trial and that his absence is not due merely to a preference to use his deposition rather than to testify orally at the trial. This interpretation would be consistent with the principle that "The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand." *Napier* v. *Bossard* (2 Cir.), 102 F.2d 467-469. "For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of the narratives." [fol. 257] *Arnsten* v. *Porter* (2 Cir.), 154 F.2d 464, 470. Compare Rule 26(d)(5) which establishes the "importance of presenting the testimony of witnesses orally in open court." This interpretation of Rule 26 is consonant with the rule that a plaintiff can be compelled to come to the district in which the action is filed to give his deposition. *Collins* v. *Wayland* (9 Cir.), 139 F.2d 677, 678.

The depositions of Kendall and Piowaty should be excluded for a further reason. Plaintiffs made no showing at the trial that these witnesses were a greater distance away than 100 miles. Rule 26(d)(3), Federal Rules of Civil Procedure; compare *Mercado* v. *United States* (2 Cir.), 184 F.2d 24, 26-27. Similarly, no such showing was made for the witnesses Biggars and Wimbish, and their depositions should be excluded from evidence. Ibid.

I. Objections to Specific Portions of Plaintiffs' Depositions

Defendants further object to the following portions of the depositions of the witnesses David M. Biggars, Roy W. Harkness, Harold E. Kendall, and Fred Piowaty.

I. *Witness David M. Biggars*

Deposition Transcript

ll. 15-19, p. 9	Answer is based on hearsay.
ll. 20-24, p. 9	Expression of opinion.
ll. 4-17, p. 18	Answer is based on hearsay.
ll. 23, p. 29 to "concerned" in l. 1, p. 30	Answer based on hearsay.
ll. 2-9, p. 71	Question is leading and suggestive.
ll. 18-22, p. 75	Question is leading and suggestive.
ll. 19-20, p. 76	Question is leading and suggestive.

II. *Witness Roy W. Harkness*

ll. 22-25, p. 93	Question is leading and suggestive.
[fol. 258] ll. 13-18, p. 108	Answer is based on hearsay. In cross-examination Dr. Harkness testified that he had no personal knowledge regarding the source and date of picking of the avocados tested, but obtained his knowledge from the person who brought the fruit into the Sub-Tropical Experiment station. Dep. Tr. 114-119.

III. *Witness Harold E. Kendall, President, Plaintiff South Florida Growers Association, Inc. Dep. Tr. 158:*

ll. 18-21, p. 161	Expression of opinion and belief.
l. 2, commencing with "I" to l. 8, p. 163	Expression of opinion or belief, and answer based on hearsay.

Deposition Transcript	
l. 25, p. 165, to l. 6, p. 166	Question is leading and suggestive.
ll. 14-24, p. 167	Answers are based on hearsay. In cross-examination Kendall testified that his employees picked the avocados and delivered them to the experiment station, not the witness. Dep. Tr. 194.
ll. 8-12, p. 168	Answer based on hearsay. The witness had no personal knowledge of the transactions reflected in exhibit 13 for identification. Dep. Tr. 194.
ll. 12-20, p. 169	Answer based on hearsay, i.e., the contents of the unidentified document from which the witness was reading. Dep. Tr. 169.
ll. 5-19, p. 170	Answer based on hearsay. The witness had no personal knowledge of the transaction reflected in exhibit 13 for identification. Dep. Tr. 194.
l. 6, commencing with "because" to l. 17, p. 186	Answer based on hearsay.
l. 13, commencing with "he" to l. 3, p. 189	Answer based on hearsay.

[fol. 259]

IV. *Witness Fred Piowaty, Secretary, Plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 249:*

ll. 21-25, p. 254	Answer is based on hearsay. In cross-examination Piowaty testified that he had no first-hand information regarding the picking or delivery of the avocados delivered to the experiment station. Dep. Tr. 267-268.

Argument

I. The California Avocado Maturity Law Does Not Constitute an Undue Burden on Interstate Commerce

California's avocado maturity law was enacted in 1925. Stats. 1925, Chap. 350, pp. 625, 633. The purpose of the statute is to reach a domestic situation—the marketing of immature avocados—in the interest of the welfare of consumers and producers of avocados. Such a state enactment is not invalid under the commerce clause merely because it incidentally or indirectly affects interstate commerce. See *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351, where the Court said:

> ". . . One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce . . .
>
> ". . . The purpose of the statute under review obviously is to reach a domestic situation in the interest [fol. 260] of the welfare of the producers and consumers of milk in Pennsylvania."

The California avocado standardization law meets the test of constitutionality stated in the recent case of *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 448:

> ". . . State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. [Cases cited.]"

In *Simpson* v. *Shepard*, 230 U.S. 352, 408, the Supreme Court stated:

> "State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and

imposition are valid when reasonable in their requirements and not in conflict with federal rules, though they may affect interstate commerce . . ."

The Supreme Court in the *Huron Portland Cement* case emphasized that the commerce clause leaves the states with broad powers in regulating commerce, stating:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution" (Id. at 443, 444).

[fol. 261] In attacking the California enactment as constituting an undue burden on interstate commerce, the plaintiffs claim that the law is "inherently discriminatory." Tr. 173. No claim is made that the California law is enforced dishonestly against Florida avocados. Tr. 173.

Plaintiffs argue that the West Indian varieties are low in oil content. Plaintiffs' Brief 10. However, with the exception of the Waldins, the West Indians are "minor varieties." Dep. Tr. 164-165. In the 1959-1960 shipping season, the West Indian varieties, other than Waldin, constituted only 3.02% of the total Florida crop.[4] Defendants' Exhibit E in evidence. Even if the variety Waldin were included, this figure would be 12.17% of the total Florida crop. *Ibid.*

Dr. Harkness, called as a witness by plaintiffs, testified that "the Waldens did not reach eight percent [oil content], let's say, until December, which is the normal time for picking Waldens." Dep. Tr. 103. It would appear therefore, that Waldins, although considered a West Indian

[4] See footnote 1, supra, at page 6.

variety, cannot fairly be included with those varieties with low oil content.

Two avocado marketing experts testified at the trial that it would not be commercially profitable to market Florida's West Indian varieties in California. Tr. 164, 179. Defendants' witness Pressley Wiggs testified that the long transit time from Florida to California, and "a tendency for West Indian varieties to break down quite rapidly after they have been removed from cold storage," leaves insufficient time for the retailer to sell the fruit and make a profit. Tr. 164-165. Defendants' witness Albert C. Jones testified that the West Indian varieties such as Fuchs, Pollocks, Waldin and [fol. 262] Hicksons were poor shippers. Tr. 178. He testified that in his marketing experience he had found that the poor shipping qualities of West Indian varieties and their short shelf life resulted in marketing losses which built up a sales resistance not only to the West Indian varieties, but to all varieties of avocados. Tr. 179-180.

The testimony of these marketing experts was corroborated by plaintiffs' witness Harding who testified that the West Indian varieties soften more quickly after picking and have a shorter shelf life than the higher oil content hybrid varieties. Tr. 71-72. Therefore, the fruit must be moved to market faster and precautions taken to insure quick retail sale. Tr. 72.

Significantly, the proportion of West Indian varieties (excluding Waldins) dropped from 10.47% in the 1955-1956 season to 3.02% in the 1959-1960 season. Defendants' exhibit E in evidence. It may be inferred that this decrease was due to the indicated poor keeping and shipping qualities of the West Indian varieties, which in turn has caused a shift of production into the high oil content hybrid varieties.

Kendall testified that the hybrid varieties of avocados had been planted extensively in Florida in the ten years preceding 1958. Dep. Tr. 164. Defendants' Exhibit E in evidence. With respect to these hybrid varieties, plaintiffs' witness Harkness stated that ". . . the late maturing varieties did not reach or approach edible condition, or judged by the people who ate them, until the oil content

was comparatively high, perhaps seven to eight percent, or higher." Dep. Tr. 103.

The record then, shows that plaintiffs' charge of inherent discrimination rests on the fact that some of the West [fol. 263] Indian varieties, representing only a small part of Florida avocado production, cannot meet the 8% California oil standard. These West Indian varieties are poor shippers and have a shorter "shelf life." In the opinion of two expert witnesses with long experience in marketing, it would not be commercially profitable to market West Indian variety avocados in California for reasons other than of the 8% oil content requirement.

The hybrid varieties are growing in commercial importance in Florida. In the 1959-1960 season they constituted 87.83% of all commercial production in the State of Florida. Defendants' Exhibit E in evidence.[5] Since the hybrid varieties have been planted extensively in Florida in recent years (Dep. Tr. 164), it can be expected that they will continue to grow in importance as the West Indian varieties decline.

The hybrid varieties have both the shipping qualities and the oil content for successful marketing in California. Indeed, as counsel for plaintiffs brought out at the trial, Calavo Growers of California marketed in California approximately $1,000,000 worth of Florida avocados per year from 1951 to 1955. Tr. 166-167. See Defendants' Exhibits A, B, C and D in evidence for sales by plaintiffs in California.

Why, then, are plaintiffs seeking to have the California avocado maturity law declared invalid? Defendants' theory of the case is that plaintiffs are motivated by a strong economic desire to pick their hybrids early in the season and rush them to the California markets when California avocado production is light and the market price is high. If the plaintiffs were not so eager to hit the early California market with these hybrids, they would have no [fol. 264] difficulty complying with the 8% oil statute.

The evidence bears this out. The low point in California avocado production and sales occurs in the months of Sep-

[5] See footnote 1, supra, at 6.

tember, October and November. Tr. 162. Avocado prices in California break sharply thereafter as the Fuerte crop matures and begins hitting the market. Tr. 163. The Fuerte is the leading California variety. Tr. 116. To illustrate, the f.o.b. Los Angeles price for a 13-pound net weight container of avocados ranged from $4.50 to $5.50 in September and October, 1960. Tr. 163. The price broke in late November under the depressing effect of the Fuerte production. Tr. 163. In early February, the price range was down to $2.75 to $3.00. Tr. 163.

Plaintiffs thus have a powerful economic incentive to get into the California market ahead of the California Fuerte crop. What plaintiffs would obviously like to do is market the Lula, Booth 8, Booth 7 and other hybrids in September, October and early November, before they reach their full maturity and oil content.

Plaintiffs have experienced little difficulty with the 8% oil requirement except when they have shipped small fruit early in their season. For example, plaintiff South Florida Growers marketed 8 shipments of avocados in California in November of 1955, 11 shipments in December of 1955, and 3 shipments in January of 1956. Of these 22 shipments, all passed the California oil content requirement with one exception. 282 boxes of small fruit in one of the earliest shipments were found deficient in oil content, although 326 boxes in the same shipment containing larger fruit passed inspection. Plaintiffs' Exhibit Q for identification. Of 35 shipments marketed by this plaintiff in California in November and December of 1956 and January of 1957, all [fol. 265] passed inspection except for one November shipment in which 721 flats of small fruit were found low in oil content, while 1550 flats of larger fruit in the same shipment passed inspection. Plaintiffs' Exhibit R for identification.[a]

Defendants submit that the record fails to support plaintiffs' claim of "inherent discrimination."

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[a] Plaintiff South Florida Growers, Inc., claims successful sales in California as early as September and October. Dep. Tr. 211

II. The California Avocado Maturity Law Does Not Deny Plaintiffs Equal Protection of the Laws

The Equal Protection Clause of the Fourteenth Amendment does not require perfection in legislative classifications. *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385. Its prohibition goes no further than the invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. A legislative classification will stand if any state of facts reasonably can be conceived that would sustain it. *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 528.

The California Legislature did not act arbitrarily or capriciously in enacting the avocado maturity statute. The requirement of 8% oil content is rationally related to the legislative objective of the statute, i.e., keeping immature avocados off the market. Tr. 107, 111; 136-137; 164.

The statute has worked fairly and effectively as an avocado maturity standard for years. Tr. 106, 111, 136, 164.

Plaintiffs ask this Court to declare the California statute unconstitutional because it discriminates against avocados which reach maturity at less than 8% oil content. Pls. Br., p. 34. Plaintiffs refer to West Indian varieties which represent only a small percentage of the Florida avocado production and which are of declining commercial impor-
[fol. 266] tance. *Supra*, p. 7. Moreover, as we have seen, the effect of the California statute on West Indian varieties is hypothetical because of their high perishability. *Supra*, pages 52 to 54. Their shipping qualities are so poor and their shelf life so short that it would not be economically feasible to market them in California, even in the absence of the 8% oil statute. *Supra*, p. 52.

Just as the record fails to support plaintiffs' claim of discrimination under the Commerce Clause, it fails to support plaintiffs' claim of discrimination under the Equal Protection Clause.

[fol. 267]

III. There Is No Conflict Between the Federal Marketing Regulation and the California Avocado Maturity Law.

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, it is asserted, gives to plaintiffs the right to

market their avocados in California free of state inspection, and free of the state police power to protect California consumers from immature fruit. The issue raised is one of judicial accommodation between respect for the supplanting authority of Congress and the reserved police power of the States. The policy of accommodation formulated by the United States Supreme Court is: "We agree, that the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 227, 243.

The objective of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, is stated to be the establishment, by exercise of the power conferred on the Secretary of Agriculture, of "orderly marketing conditions for agricultural commodities in interstate commerce," such as will tend to establish "parity prices" for farm products. Section 1, Agricultural Marketing Agreement Act of 1937.

The goal of the California standardization statute is "To promote the deevlopment of the California fruit, nut and vegetable industry, and to prevent deception in the packing, marking, shipping or sale of fruits, nuts and vegetables for state, interstate or foreign commerce. . . ." California Statutes of 1925, Chapter 350, pages 625, 633.

As outlined, the federal act is designed to support the [fol. 268] prices paid for agricultural commodities moving in interstate commerce. On the other hand, the state enactment is a police measure intended to keep unfit agricultural commodities off the market. No conflict of legislative objective exists between the two laws.

Plaintiffs in this case place heavy reliance on the fact that their avocado shipments carry certificates showing federal inspection. It is asserted that this certificate frees such avocados from inspection in California terminal markets. However, in a comparable case, the Supreme Court recently upheld the additional state inspection standard. In *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, the appellant shipowner had obtained Coast Guard safety inspection of its ships' boilers, and had obtained a certificate authorizing

operation of the ships under federal law. Upon docking in the City of Detroit, that city commenced criminal proceedings under the Detroit Smoke Abatement Code after the boilers had emitted excessive smoke. The state inspection act was held valid despite the fact that appellant could not prevent the emission of excessive quantities of smoke from the federally approved boilers then installed on the ships.

The Court stated: "The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation. . . . By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community." Id., at 445. After thus finding that there was no conflict between the two laws, the Court then held that appellant's federal license availed it nothing, saying: "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal [fol. 269] incidents of local police power, not constituting a direct regulation of commerce." Id., at 447. Similarly, in the instant case, the mere fact of federal inspection does not afford plaintiffs immunity from state inspection.

In enacting the Federal Marketing Act, Congress did not intend to occupy the field to the exclusion of state regulation. *Parker* v. *Brown*, 317 U.S. 341, 358. In *Hood & Sons* v. *DuMond*, 336 U.S. 525, 542, the Supreme Court stated:

> "We assume, though it is not necessary to decide, that the Federal [Agricultural Marketing Agreement] Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the Commerce Clause."

The core of plaintiffs' argument on pre-emption is that the state cannot subject products to additional regulation once they have entered the stream of commerce pursuant to a federal marketing order. However, the Federal Marketing Act expressly contemplates dual regulation by the federal government and the states. Section 18, Act of August 24, 1935, 49 Stat. 750, 767.

Contrary to what plaintiffs here argue, it was made clear during the House debates on the Federal Act that products

marketed under a federal marketing order would not be immune from state regulatory statutes. In response to a question on the floor of the House regarding the effects of [fol. 270] the 1935 amendment[7] on the New York state milk marketing regulations, Representative Martin Jones, Chairman, House Agricultural Committee, stated: ". . . within the state, of course, such laws may be enacted as the state deems proper. We do not undertake to keep them from shipping [milk] in, and we do not authorize them to ship [milk] in. We say when they ship from some other State, they must ship in subject to the same regulatory measures that exist in a particular area. In many instances the states may wish to enact supplementary legislation, if they wish to make the program fully effective." 79 Cong. Rec., p. 9465, 74th Cong., 1st Sess. In House debate, Representative Andresen from Minnesota stated: ". . . The farmers out in our section [Minnesota] will have to meet the [milk] grade and sanitary requirements of the State of New York or the other States. . . ." 79 Cong. Rec., p. 9480, 74th Cong., 1st Sess.

[fol. 271] Plaintiffs rely on *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148, Plfs.' Br., p. 22. In this case an Alabama inspection act establishing standards for "renovated butter" was held to conflict with a federal statute which authorized condemnation of "packing stock butter," a product manufactured from "renovated butter." The conflict found by the court was twofold: (1) the state confiscation interfered with the federal inspection and (2) it destroyed the product intended to be subsequently regulated and taxed by Congress. "The argument that it is improper to infer a restriction on [state] confiscation of material when [fed

[7] Section 8(c) of the Act of May 12, 1933, 48 Stat. 31, 34, authorized the Secretary of Agriculture to license all handlers and processors engaged in handling agricultural commodities in interstate commerce. Such licenses could be revoked if such person violated the marketing regulations issued under the Act. Section 8(c) was stricken out by the Act of August 24, 1935, 49 Stat. 750, 753, and replaced by a new section 8(c) which authorized the issuance of marketing "orders" governing the handling of agricultural commodities in interstate commerce. The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, re-enacted section 8(c) of the 1935 Act.

eral] confiscation of product is permitted fails to give weight to the difference between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. *The latter type is permissible under all the authorities.*" (Emphasis added.) Id., at 162. The operation of the federal avocado shipping restrictions ceases after the avocados leave the Florida area of production. 7 C.F.R. 969.4. Hence there is no conflict in administration of the federal enactment by subjecting these avocados to subsequent state inspection. The quoted language from the *Cloverleaf* case, 315 U.S. 148, 162, indicates that a different state food inspection requirement in the state of consumption is constitutionally permissible.

Defendants defend the state law as a reasonable effort by the California legislature to protect its citizens from immature food. The facts are in this case similar to those in ***Reid* v. *Colorado***, 187 U.S. 137. Appellant Reid had obtained federal disease inspection of his cattle in Texas and, upon shipment of the cattle to Colorado, he had refused to pay for state disease inspection. His criminal conviction [fol. 272] for having failed to obtain such inspection was affirmed, even though there was no proof that the particular cattle in question were diseased. The court found no conflict between the state and federal inspection statutes since the federal act provided for federal-state cooperative disease control programs. See also *Mintz* v. *Baldwin*, 289 U.S. 346, holding that a New York dairy cattle quarantine law was valid and not in conflict with the federal Cattle Contagious Diseases Act, 32 Stat. 791.

[fol. 273]

IV. The California Maturity Statute Has the Effect of Complementing the Federal Regulation Rather Than Conflicting With It.

Avocados are unique in that they are ordinarily purchased in a retail grocery store in a hard inedible condition, with the purchaser keeping the avocado at room temperature for several days to allow a further maturation and softening of the fruit. Tr. 107, 160. If at the end of

this waiting period, and with a salad ready to serve, the avocado is shriveled and has a bitter taste, the housewife is unlikely to purchase more avocados. Tr. 162. The result would be that consumer demand would drop and the avocado growers of both Florida and California would sell fewer avocados. Tr. 162.

The Secretary of Agriculture found, with respect to Florida avocados, that:

> "There has not been developed any satisfactory outlet for avocados other than the fresh market. The growers and handlers of Florida avocados have been accustomed to sell in fresh market channels the entire harvested production of Florida avocados, including fruit which is immature and otherwise of poor quality and undesirable appearance. This has tended to reduce the demand, and hence the market prices received, for Florida avocados. There are no officially established grade standards for avocados. Hence, Florida handlers have endeavored to fix their own grades for their individual packs and to market under such grades. However, the differences, or lack of uniformity, in these grade designations have tended further to create confusion in the minds of the buyers. In addition, many handlers have varied their individual grade standards to reflect variations in the supply, [fol. 274] quality and demand for Florida avocados during a particular season. Thus, Florida avocados of undesirable quality frequently have been marketed in a manner designed to indicate that such avocados were of desirable quality. This situation has resulted in considerable confusion in the minds of buyers concerning the quality of Florida avocados and has created lack of confidence in such fruit. The existence of this undesirable situation is generally recognized by the growers and handlers, and the consensus of opinion is that it can be resolved only by the imposition of standards of quality and maturity as a condition precedent to the marketing of Florida avocados. . . ." 7 C.F.R., Part 969, Vol. 19, p. 2419.

These findings are strikingly similar to those of the University of California:[8]

> "In order to provide for uniformity in the maturity of the fruit at the time of harvesting and especially to prevent the sale of immature avocados, a practice which had become a menace to the industry, the California avocado growers in 1925 succeeded in having a state maturity standard of 8 percent fat or oil content established. This action has been productive of very great benefit to the industry in that it has effectively eliminated immature fruit, mostly windfalls or stolen fruit, from the markets."

In short, both the federal regulation and the California statute have the effect of keeping immature avocados off the market. To this extent, they tend to complement [fol. 275] each other rather than conflict. No one would seriously contend that either standard is perfect or 100% effective in accomplishing its purpose. Legislative or administrative standards of general application are never perfect, and perfection is not required of them. *cf. Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385. No doubt some immature Florida fruit is shipped into interstate commerce even after passing inspection under the federal regulation. The imperfections in the federal size and picking date standards of maturity were noted by the expert witnesses. Tr. 62, 80, 143. Both standards undoubtedly keep off the market most fruit that is immature. But they do not assure that all fruit that does pass inspection is mature although this is what plaintiffs must argue when they contend that a federal inspection certification necessarily stamps their fruit as mature.

Defendants submit that plaintiffs are in error in contending that the federal inspection certificate gives them a license to be free of state regulation. To go back to the recent words of the Supreme Court, "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police

[8] The California Avocado Industry, Calif. Ag. Ext. Service, Univ. of Calif., Circular 43, April 1930, p. 39.

power, not constituting a direct regulation of commerce." *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 447.

In summary, the federal regulation and the state statute are not in direct conflict. They can consistently stand together. *cf. Sinnot* v. *Davenport*, 22 How. 227, 243. Congress clearly did not intend the Federal Marketing Act to pre-empt the field to the exclusion of state regulations. The Federal Act provides what are essentially self-help remedies for agriculture. The members of an industry, such as the Florida avocado industry, take the initiative and [fol. 276] exercise control in formulating, adopting and administering a marketing regulation, subject only to approval by the Secretary of Agriculture. Tr. 63-64.[9] It cannot be imagined that Congress intended that these self-help regulations could be used by an industry to nullify the enactment of a State Legislature.

[fol. 277]

V. Plaintiffs Have Not Shown Sufficient Economic Injury to Justify Equitable Relief by This Court.

Plaintiffs filed their complaint challenging the validity of the California avocado maturity statute on November 13, 1957. On March 14, 1958, defendants moved to dismiss the complaint. The principal ground for defendants' motions to dismiss was that plaintiffs had made an insufficient showing of injury to warrant the invocation of the court's discretionary powers to interfere with a state's enforcement of its own laws. Defendants relied upon such bench mark cases as *Douglas* v. *Jeannette*, 319 U.S. 157, and *Spielman Motor Company* v. *Dodge*, 295 U.S. 89. These cases and others establish an important principle of judicial restraint followed by federal courts in the exercise of their powers of equity against state officials enforcing state laws.

The Supreme Court has said that a plaintiff asking a federal court of equity to disturb the delicate balance of

[9] The Avocado Administrative Committee has the power to exempt any person's avocados from compliance with the federal regulations establishing date, weight and size shipping instructions. The person need only furnish proof "satisfactory to the committee" that his avocados are "mature." 7 C.F.R. 969.53.

our federal-state relations by restraining state officers from the performance of their official acts must pass a "strict test" of injury. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593. To justify interference by the federal chancellor in the enforcement of state laws, the plaintiff must show "exceptional circumstances"; he must show that the exercise of the federal powers of equity is necessary to prevent "irreparable injury" both "great and immediate". These authorities are discussed at length in defendant's points and authorities supporting their motions to dismiss.

After hearing oral argument on defendants' motions to dismiss, this court entered an order dismissing the complaint on the ground that it had no jurisdictional power to decide the case because of the absence of a justiciable case [fol. 278] or controversy within the meaning of Article III of the United States Constitution. In its order dismissing the action, this court made it clear that it had no authority whatsoever to take jurisdiction in the case, and could not therefore rule on defendants' motions to dismiss. The court stated: "Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' motions to dismiss." 169 F. Supp. 774, 776.

There is a fundamental difference between the foundation of this court's order of dismissal and the grounds for defendants' motions to dismiss. This court held that it had no jurisdictional power to decide the case. Defendants in their motions to dismiss argued, in essence, that this court should not, as a matter of discretion, exercise its jurisdictional power because plaintiffs had not suffered sufficient economic injury from the California statute under attack. In their brief to the United States Supreme Court, defendants pointed out this distinction. They noted that the issue before the Supreme Court was whether there was a justiciable controversy which gave the district court jurisdictional power over the case. Since the district court did not rule on defendants' motions to dismiss, the issues raised by those motions were not before the Supreme Court. Those issues could not be reached by the District Court because it had decided that it lacked basic jurisdictional power over the case.

The Supreme Court carefully observed this distinction in its opinion. It held that there was a justiciable controversy, but was careful not to pass judgmen on issues that had not yet been decided by the District Court and therefore not properly before the Supreme Court. The Court held that the allegations of the complaint were sufficient to [fol. 279] show that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." *Florida Lime and Avocado Growers* v. *Jacobson*, 362 U.S. 73, 85-86. Note that the Court carefully refrained from stating whether plaintiffs were entitled to equitable relief. In the absence of a right to equitable relief, plaintiffs may have a right to determination on the merits by a normal one-judge district court, but have no right to a trial on the merits before an extraordinary three-judge court, 28 U.S.C. 2281; 2284; *cf. Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241.

In short, the questions raised by defendants' motions to dismiss have never been adjudicated. Defendants reiterate that plaintiffs have completely failed to make a showing of "irreparable injury" both "great and immediate". They have shown only that a very small percentage of all avocados shipped to California have failed to meet the statute in question; the vast majority of avocados shipped by plaintiffs to California have passed California's avocado maturity statute and have been marketed freely on California markets. The injury to plaintiffs resulting from the rejection of a few shipments is *de minimus.*

Plaintiff Florida Lime and Avocado Growers, Inc., was incorporated in Florida April 6, 1956. Dep. Tr. 249; Stipulation of Counsel, on file herein. It is engaged in the business of marketing limes, mangos, tomatoes, potatoes and avocados. Dep. Tr. 249. The corporation has made sales of avocados in 47 states, including California. Dep. Tr. 252. Plaintiff South Florida Growers, Inc., was incorporated in Florida April 29, 1953, and is engaged in the business of [fol. 280] marketing limes, mangos, and avocados. Dep. Tr. 159-160; Stipulation of Counsel, on file herein. Avocados are marketed in 47 states, including California. Dep. Tr. 189.

Plaintiffs' business operations are reflected in the following chart which compares their gross sales, avocado gross sales, and California avocado sales for the listed marketing seasons: Defendants' Exhibits A, B, C, and D in evidence.

South Florida Growers Association, Inc.,
Incorporated in Florida, April 29, 1953.
Stipulation of Counsel, on file herein.

	March 31, 1954 March 31, 1955	March 31, 1955 March 31, 1956	March 31, 1956 March 31, 1957
Gross Sales	$1,476,353.07	$1,660,492.97	$1,718,098.70
Avocado Gr. Sales	$ 820,068.00	$ 993,409.00	$1,006,241.00
Calif. Avoc. Sales	$ 78,905.31	$ 129,543.11	$ 15,065.68
	March 31, 1957 March 31, 1958	March 31, 1958 March 31, 1959	March 31, 1959 March 31, 1960
Gross Sales	$1,293,445.68	$ 708,850.61	$ 994,421.41
Avocado Gr. Sales	$ 974,201.75	$ 524,514.55	$ 581,288.21
Calif. Avoc. Sales	$ 12,973.78	$ 0.00	$ 0.00

Florida Lime and Avocado Growers, Inc.,
Incorporated in Florida, April 6, 1956.
Stipulation of Counsel, on file herein.

	April 6, 1956 March 31, 1957	March 31, 1957 March 31, 1958
Gross Sales	$546,737.85	$723,649.67
Avocado Gross Sales	$233,358.46	$209,958.09
Calif. Avocado Sales	$ 26,332.53	$ 16,893.34
	March 31, 1958 March 31, 1959	March 31, 1959 March 31, 1960
Gross Sales	$336,214.10	$715,667.68
Avocado Gross Sales	$ 80,428.08	$247,599.22
Calif. Avocado Sales	$ 0.00	$ 0.00

[fol. 281] Plaintiff South Florida Grower, Inc., commenced marketing avocados in California during the 1954-1955 season. Dep. Tr. 183, 190. Plaintiff Florida Lime and Avocado Growers, Inc., commenced the marketing of avocados in California in the 1956-1957 season. Dep. Tr. 249-250, 261. During plaintiffs' operations in California, 96.35% of all avocados shipped by plaintiffs to California have passed the 8% oil test of maturity and were freely marketed in California. Plaintiffs' Exhibits for identification, 17, 19, 20, 21 and S. Tr. 29.

In November of 1957, plaintiff Florida Lime and Avocado Growers, Inc., had 361 lugs of its avocados tested for oil content at Los Angeles, California. Plaintiffs' Exhibit 21 for identification. Being found to have less than 8% oil content, the avocados were reshipped by this plaintiff to Phoenix, Arizona. No loss is claimed on this transaction. Plaintffs' Exhibit 21 for identification. These 361 lugs represented only .036% of the total of 9,971 lugs shipped to California during the 1957-1958 shipping season. Plaintiffs' Exhibit S for identification. No other shipments are listed by this plaintiff corporation which encountered marketing difficulties in California.

Plaintiff South Florida Growers Association, Inc., shows that during the 1954 to 1957 marketing seasons 641 bushels of avocados were determined by California authorities to be out of conformity with the 8% oil standard. Plaintiffs' Exhibits 17 and 19 for identification. This figure of 641 bushels represents only 1.84% of the total of 34,905 marketed by this plaintiff in California during this period. Plaintiffs' Exhibit 19 for identification. This plaintiff shows a reduction in gross income on noncomplying fruit transshipped from California as follows: 1954-1955, $554.33, [fol. 282] representing 0.7% of this plaintiff's California sales; 1955-1956, $210.62, representing .16% of this plaintiff's California sales; and 1956-1957, $821.62, representing 5.4% of this plaintiff's California sales. Plaintiffs' Exhibit 17 for identification; Defendants' exhibits A, B, C, and D in evidence.

Neither plaintiff has made shipments of avocados for sale in California in either the 1958-1959 marketing seasons.

nor in the 1959-1960 marketing seasons. Defendants' Exhibits A, B, C, and D in evidence.

To permit plaintiffs on this record to have a three-judge federal district court decide the constitutional issues, with the burden that this procedure places upon the federal judicial system, would make a mockery of cases such as *Spielman Motor Co.* v. *Dodge, supra,* 295 U.S. 89, and *Douglas* v. *Jeannette, supra,* 319 U.S. 157. The fact that the case has already been tried is no reason to relax the important rule announced in these cases. Compare *Spielman Motor Co.* v. *Dodge, supra,* 295 U.S. 89.

[fol. 283] **Conclusion**

For the reason stated, it is respectfully submitted that the court should dismiss the plaintiffs' complaint or, in the alternative, enter judgment for defendants.

Respectfully submitted,

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, Lawrence E. Doxsee, Deputy Attorney General, Attorneys for Defendants.

[fol. 284] EXHIBIT A TO REPLY BRIEF

3 California Administrative Code

Omitted. Printed side folio 86, page 81 supra.

[fol. 285]

EXHIBIT B TO REPLY BRIEF

REPRINT FROM
THE BULLETIN
DEPARTMENT OF AGRICULTURE
STATE OF CALIFORNIA

VOL. XLIV JANUARY-FEBRUARY-MARCH, 1955 NUMBER 1

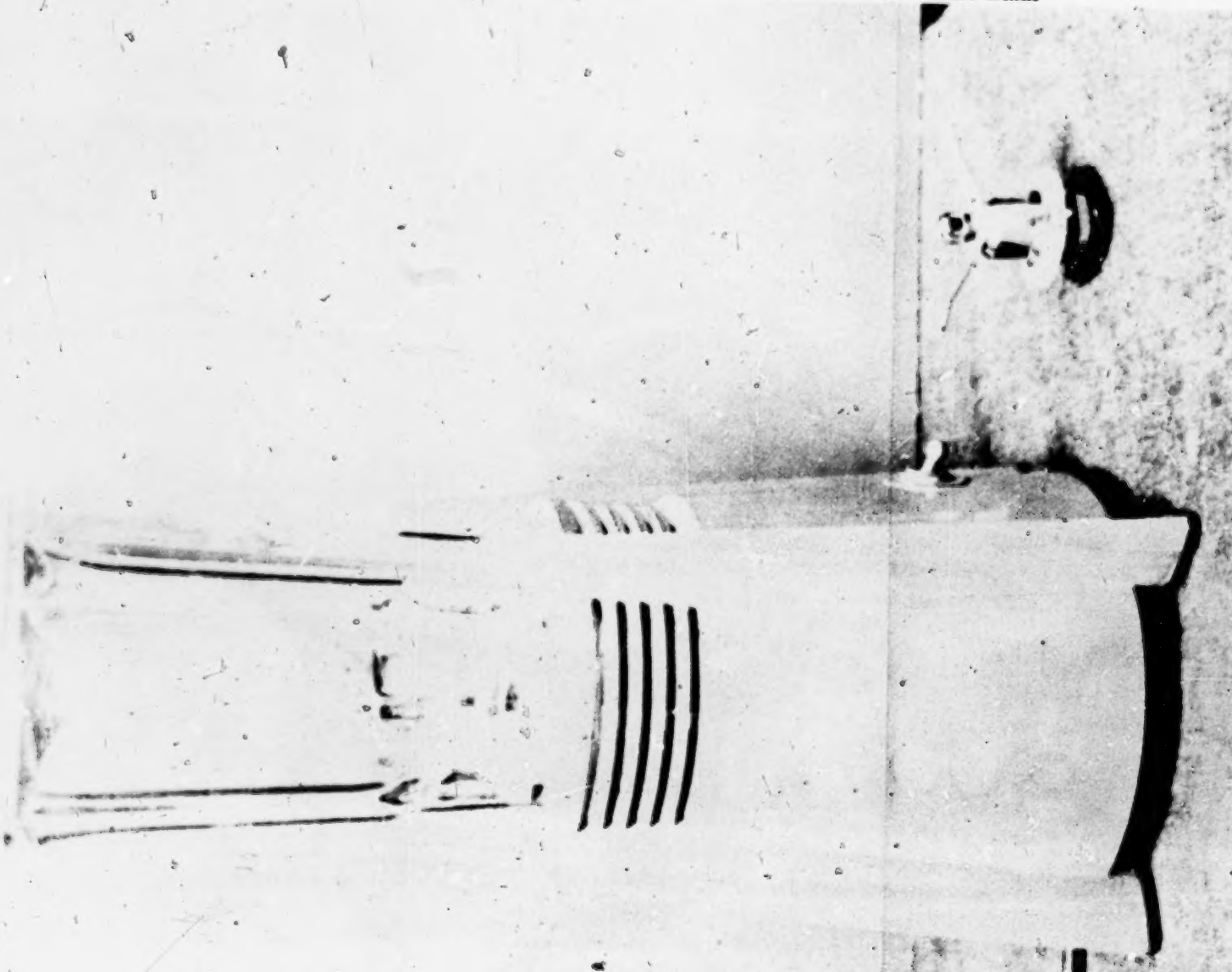
OFFICIAL METHOD FOR THE DETERMINATION OF OIL IN AVOCADOS

(Revised 1954)

Omitted. Printed side folio 99, page 93 ante.

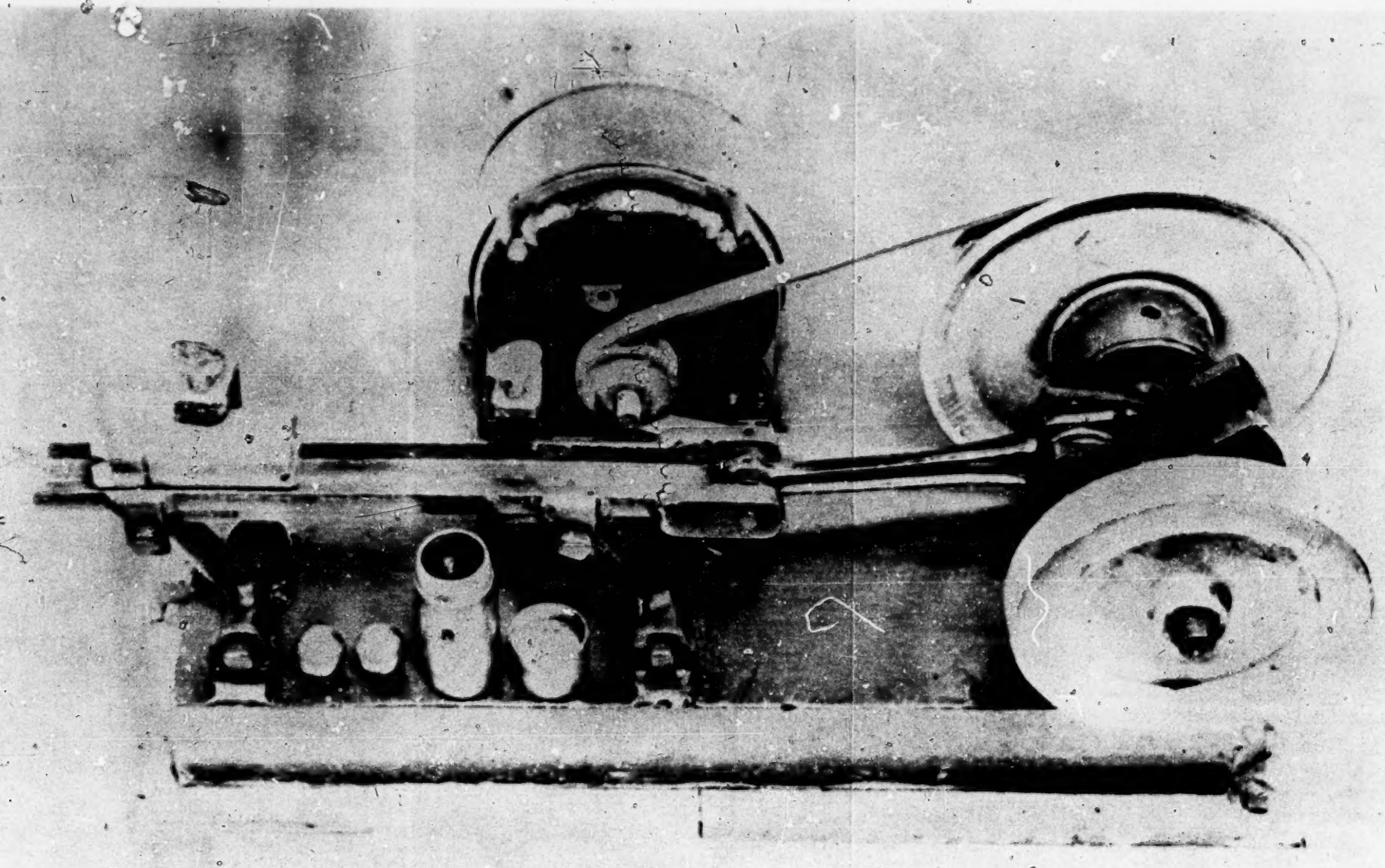
[fol. 290]

EXHIBIT C TO TRIAL BRIEF



[fol. 291]

EXHIBIT D TO TRIAL BRIEF



This certifies that the attached report of Chemical Analysis dated December 11, 1958, is the original and official report of the Bureau of Chemistry, State of California.

R Z Rollins

Robert Z. Rollins, Chief
Bureau of Chemistry

Subscribed and sworn to before me this 14th day of April, 1961.

Anne Marie Muir

Notary Public in and for the County of Sacramento, State of California.
My Commission Expires February 25, 1964

[fol. 292]

EXHIBIT E TO TRIAL BRIEF

~~(EXHIBIT E)~~

292

No Fee. Information for guidance of sender in his official duties.

STATE OF CALIFORNIA
DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
SACRAMENTO 14

To: Mr. Harold Poulsen, Chief (2) Date December 11, 1958
Bureau of Fruit and Vegetable Standardization
1220 N Street
Sacramento, California

REPORT TO SENDER ON INFORMATION SAMPLE AS RECEIVED

Following are the results of analysis of a sample or samples as received from you by this laboratory:

Information Sample No. 14533-14548 Received December 8, 1958

Sender's description of sample Kendall brand Lula variety avocados packed by South Florida Growers Assn., Inc., Goulds, Florida. Comparative analyses for oil content made by two procedures on the same fruit. Size 16.

HSS, FID 3-120 RESULTS OF EXAMINATION

See attached sheet

RECEIVED

Address correspondence to:
STATE DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
1220 N Street
Sacramento 14, California

BUREAU OF CHEMISTRY
By J. B. LaClair

(Exhibit E)

293

[fol. 293]

752

79715 8-58 750 THIP © SPO

FOUND
OIL, PER CENT

Information No.	Florida Blendor Method of Harkness (1)	California Ball-Grinder Method (Official) (2)	Difference
14533	6.6	10.2	3.6
14534	5.9	10.0	4.1
14535	5.8	9.8	4.0
14536	7.2	11.0	3.8
14537	6.4	10.4	4.0
14538	6.7	10.6	3.9
14539	6.5	9.3	2.8
14540	6.8	10.4	3.6
14541	6.1	9.3	3.2
14542	5.8	8.7	2.9
14543	5.7	8.5	2.8
14544	6.5	9.8	3.3
14545	8.6	12.6	4.0
14546	9.1	12.6	3.5
14547	7.5	10.5	3.0
14548	8.9	11.1	2.2
		Average difference	3.4

(1) Five grams avocado, 5 ml. Halowax, 200ml. water, blended 10 minutes in Waring Blendor.

(2) Five grams avocado, 5 ml. Halowax, ground 15 minutes.

This certifies that the attached report of Chemical Analysis dated November 20, 1958, is the original and official report of the Bureau of Chemistry, State of California.

Robert Z. Rollins, Chief
Bureau of Chemistry

Subscribed and sworn to before me this 14th day of April, 1961.

Notary Public in and for the County of Sacramento, State of California.

My Commission Expires February 25, 1964

(EXHIBIT E)

No Fee. Information for guidance of sender in his official duties.

STATE OF CALIFORNIA
DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
SACRAMENTO 14

To: Mr. Harold W. Poulsen, Chief
Bureau of Fruit and Vegetable
Standardization
1220 N Street
Sacramento, California

Date November 20, 1958

REPORT TO SENDER ON INFORMATION SAMPLE AS RECEIVED

Following are the results of analysis of a sample or samples as received from you by this laboratory:

Information Sample No. 14476-91 Received November 17, 1958

Sender's description of sample Lula avocados shipped by George Norris, 5731 Northwest Second Street, Miami, Florida to Mr. Whipple, to be tested for comparison of California State Method and Harkness Blendor Method of oil determination. Both tests on same fruit.

RESULTS OF EXAMINATION

Inf. No.	Found Oil, Per Cent(1) Method A(2)	Method B(3)	Inf. No.	Found Oil, Per Cent Method A	Method B
14476	7.0	11.0	14484	4.8	6.0
14477	7.1	10.6	14485	4.9	6.7
14478	6.5	9.3	14486	5.0	6.8
14479	6.4	10.2	14487	5.8	8.4
14480	7.3	10.1	14488	5.7	6.5
14481	5.7	8.2	14489	7.6	9.0
14482	6.4	9.2	14490	6.1	7.3
14483	7.5	11.6	14491	11.0	12.1

(1) Alternate eighths taken longitudinally tested by Method A - Harkness, Blendor Method, and Method B - California Ball-Grinder Method.

(2) Five gram sample, 5 ml Halowax oil, 200 ml. water, blended 10 minutes.

(3) Five gram sample, 5 ml Halowax oil, ground 15 minutes.

[fol. 296]

1220 N Street
Sacramento, California

REPORT TO SENDER ON INFORMATION SAMPLE AS RECEIVED

Following are the results of analysis of a sample or samples as received from you by this laboratory:

Information Sample No. 14476-91 Received November 17, 1958

Sender's description of sample Lula avocados shipped by George Norris, 5731 Northwest Second Street, Miami, Florida to Mr. Whipple, to be tested for comparison of California State Method and Harkness Blendor Method of oil determination. Both tests on same fruit.

RESULTS OF EXAMINATION

Inf. No.	Found Oil, Per Cent(1) Method A(2)	Method B(3)	Inf. No.	Found Oil, Per Cent Method A	Method B
14476	7.0	11.0	14484	4.8	6.0
14477	7.1	10.6	14485	4.9	6.7
14478	6.5	9.3	14486	5.0	6.8
14479	6.4	10.2	14487	5.8	8.4
14480	7.3	10.1	14488	5.7	6.5
14481	5.7	8.2	14489	7.6	9.0
14482	6.4	9.2	14490	6.1	7.3
14483	7.5	11.6	14491	11.0	12.1

(1) Alternate eighths taken longitudinally tested by Method A - Harkness, Blendor Method, and Method B - California Ball-Grinder Method.

(2) Five gram sample, 5 ml Halowax oil, 200 ml. water, blended 10 minutes.

(3) Five gram sample, 5 ml Halowax oil, ground 15 minutes.

[fol. 296]

Address correspondence to:
STATE DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
1220 N Street
Sacramento 14, California

BUREAU OF CHEMISTRY

By A J Bingham

(Exhibit E)

296

755

Results of Tests Made on 32 Florida Avocados by State of California Bureau of Chemistry.
(Explanation of Methods Shown on Official Report)

FOUND OIL. PERCENT

Date Tested	A Harkness Waring Blendor Method	B California Ball Grinder Method	Difference Between Methods A and B	Percent of Difference In Found Oil Between Method A and B
11-17-58	7.0	11.0	4.0	36.4
	7.1	10.6	3.5	33.0
	6.5	9.3	2.8	30.3
	6.4	10.2	3.8	37.2
	7.3	10.1	2.8	27.7
	5.7	8.2	2.5	30.4
	6.4	9.2	2.8	30.4
	7.5	11.6	4.1*	35.3
	4.8	6.0	1.2	20.0
	4.9	6.7	1.8	26.8
	5.0	6.8	1.8	26.4
	5.8	8.4	2.6	30.9
	5.7	6.5	.8*	12.1
	7.6	9.0	1.4	15.5
	6.1	7.3	1.2	16.4
	11.0	12.1	1.1	9.9**
12-8-58	6.6	10.2	3.6	35.9
	5.9	10.0	4.1	41.0**
	5.8	9.8	4.0	40.8
	7.2	11.0	3.8	34.5
	6.4	10.4	4.0	38.4
	6.7	10.6	3.9	36.7
	6.5	9.3	2.8	30.0
	6.8	10.4	3.6	34.6
	6.1	9.3	3.2	34.4
	5.8	8.7	2.9	33.3
	5.7	8.5	2.8	32.9
	6.5	9.8	3.3	33.6
	8.6	12.6	4.0	31.7
	9.1	12.6	3.5	27.7
	7.5	10.5	3.0	28.5
	8.9	11.1	2.2	19.8
		Arithmetical Average	2.9	

EXHIBIT F TO TRIAL BRIEF

* Denotes high and low differences in found oil content by comparing Methods A and B.

** Denotes high and low variations in percent of found oil content in comparing Methods A and B.

Date Tested	Waring Blendor Method	Shell Grinder Method	Between Methods A and B	In Found Oil Between Method A and B
11-17-58	7.0	11.0	4.0	36.4
	7.1	10.6	3.5	33.0
	6.5	9.3	2.8	30.3
	6.4	10.2	3.8	37.2
	7.3	10.1	2.8	27.7
	5.7	8.2	2.5	30.4
	6.4	9.2	2.8	30.4
	7.5	11.6	4.1*	35.3
	4.8	6.0	1.2	20.0
	4.9	6.7	1.8	26.8
	5.0	6.8	1.8	26.4
	5.8	8.4	2.6	30.9
	5.7	6.5	.8*	12.1
	7.6	9.0	1.4	15.5
	6.1	7.3	1.2	16.4
	11.0	12.1	1.1	9.9**
12-8-58	6.6	10.2	3.6	35.9
	5.9	10.0	4.1	41.0**
	5.8	9.8	4.0	40.8
	7.2	11.0	3.8	34.5
	6.4	10.4	4.0	38.4
	6.7	10.6	3.9	36.7
	6.5	9.3	2.8	30.0
	6.8	10.4	3.6	34.6
	6.1	9.3	3.2	34.4
	5.8	8.7	2.9	33.3
	5.7	8.5	2.8	32.9
	6.5	9.8	3.3	33.6
	8.6	12.6	4.0	31.7
	9.1	12.6	3.5	27.7
	7.5	10.5	3.0	28.5
	8.9	11.1	2.2	19.8
		Arithmetical Average	2.9	

EXHIBIT F TO TRIAL BRIEF

* Denotes high and low differences in found oil content by comparing Methods A and B.

** Denotes high and low variations in percent of found oil content in comparing Methods A and B.

(EXHIBIT F) 277.

[fol. 298] Affidavit of Service by Mail (omitted in printing).

[fol. 299] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California, Defendants.

MEMORANDUM AND ORDER—July 10, 1961

Plaintiffs instituted this suit against certain officials[1] of the State of California. Plaintiffs seek an injunction against the enforcement of certain portions of the California Agricultural Code, which plaintiffs contend to be in conflict with the Commerce and Equal Protection Clauses [fol. 300] of the Federal Constitution, and with the Federal Agricultural Marketing Agreement Act of 1937 (Title 7 U.S.C. §601 *et seq.*) and Florida Avocado Order No. 69 issued under the said Act.

The plaintiffs are Florida growers and packers of avocados, engaged in the interstate marketing of their product. They ship avocados into California, among other states.

---

[1] The motion to substitute Charles Paul, Director of Agriculture of the State of California, for defendant Warne, his predecessor in that office, will be granted (Federal Rules of Civil Procedure, Rule 25(d)).

California has a law (California Agricultural Code, §792) which requires avocados to contain not less than 8% oil by weight, excluding skin and seed, before they can be sold for human consumption. Plaintiffs' object in bringing this suit is to prevent the future application of this law to avocados which they wish to market in California.

This Court initially dismissed the action for want of a present, actual case or controversy (*Florida Lime & Avocado Growers* vs. *Jacobsen*, 169 F. Supp. 774). The United States Supreme Court reversed this decision, holding that there is an existing dispute amounting to a justiciable controversy which plaintiffs are entitled to have determined on the merits (*Florida Lime & Avocado Growers* vs. *Jacobsen*, 362 U.S. 73).

The case has now been heard by a three-judge Court, pursuant to the provisions of Title 28 U.S.C. §§2281 and 2284. The evidence has been heard, with the ruling on certain objections by defendants having been reserved. Both sides have argued and briefed their positions, and the case is submitted to the Court for its determination.

The Court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the Court has reserved its ruling. The exhibits and depositions [fol. 301] are very voluminous, as are the objections to them. We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible. Likewise, we do not consider it necessary at this time to hear the evidence which defendants propose to offer in rebuttal to plaintiffs' exhibit 16 for identification.[2]

The Facts

California is the major producer of avocados in the United States. Virtually all of the rest of the avocados produced in the United States are raised in Florida. California grows principally avocados of Mexican origin, of which there are a number of differing individual varieties.

[2] It is recognized that the right had been reserved to defendants to introduce such evidence at a further hearing, if necessary (See: pp. 190-191 of the trial transcript). We are of the view that such evidence is not necessary.

Florida grows principally avocados of various "hybrid" varieties. About 12% of Florida's production consists of West Indian varieties. These are declining in importance, owing to poor shipping qualities, short shelf life and the susceptibility of the trees to freezing.

In 1925, practically all of the avocados produced in the United States came from California.[3] In that year, California adopted the requirement that all avocados marketed in this State contain at least 8% oil by weight, excluding the skin and seed. There was then, and still is, a body of respectable scientific opinion to the effect that the oil con- [fol. 302] tent of avocados in the hard state is the best indicator of maturity.

Avocados are customarily picked and marketed in a hard state. After purchase by the consumer, they are allowed to soften and ripen. If the avocados are picked while immature, they shrivel up and become useless when they soften. They become rubbery and unpalatable, with an unpleasant after-taste. If they are picked when mature, they ripen while softening, and became palatable and desirable (to those who like them).

It is not simple or easy to tell whether an avocado which has just been picked, in a hard state, is, or is not, mature. A person of great experience can make a well educated guess as to whether or not such an avocado is mature, but the only sure test is to let it ripen and eat it.

There is a temptation on the part of growers to rush immature avocados to the market at the start of the season, when mature avocados are scarce and the price is high. The ordinary retailer and consumer do not realize that the avocados are immature until after they have purchased the fruit and allowed it to soften. The marketing of such avocados cheats the consumer, and it has a bad effect upon retailers and producers as a whole, since it increases future sales resistance.

To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which

[3] Florida's current high production of avocados results from heavy plantings which began in or about 1940. The trees then planted did not bear fruit until eight or ten years after being planted.

avocados are immature, at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the [fol. 303] fruit. Other expert opinion rejects this yardstick. It seems to be conceded by all that there is no better physical test than oil content by which to judge the maturity of the hard fruit by itself (other than to use the time-consuming method of letting it ripen and tasting it). Size and appearance are possible tests, but are not reliable. There is a body of expert opinion which holds that the best test of maturity is to establish picking dates for the fruit. The test used for purposes of the Florida Avocado Order is based upon picking dates.

The picking date method works as follows: For each variety of avocado in a particular production area, A, B and C dates are promulgated on the basis of past experience. No avocados of a particular variety may be picked until the A date for that variety. On and after the A date, fruit of a certain size and weight may be picked and shipped. On and after the B date, fruit of a smaller size and weight may be picked and shipped. On and after the C date, all restrictions of size and weight are removed.

The fruit growing on different trees of the same varieties matures at different times, depending on the age of the trees, the weather, soil conditions, etc. The fruit upon a particular tree does not all mature at the same time. Differences of size and weight are of assistance in picking the mature from the immature fruit which has all been picked from the same tree, but they are not infallible guides. The picking date method, then, inevitably must let some immature fruit go to market, or keep some mature fruit off the market, or both.

[fol. 304] Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be

acceptable prior to the time that they reach that content, according to plaintiffs' witnesses. West Indian varieties do not attain an 8% oil content until they are past their prime.

California is the State of greatest consumption of avocados. In 1955-1956, California produced about two-thirds of the avocados consumed in the United States, and consumed over two-thirds of its own production, in addition to being a prime market for Florida avocados.

Plaintiffs have made fairly sizeable shipments of avocados to California in the past. Over 95% of them have passed the 8% oil content test. The other shipments have mostly been reshipped to other western states, although it is permissible under the California system to recondition shipments by removing the most immature avocados in the hope of passing the test. The difficulty here appears to be the lack of external indicia of maturity or oil content. Plaintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars. Plaintiffs' shipments furnish proof that the California test does not *per se* [fol. 305] bar Florida avocados from the California market.

Plaintiffs offered testimony to the effect that there are wide variations in oil content among avocados picked from the same tree, but that tasters could not pick out the high oil avocados by taste.[4] Defendants offered testimony to the effect that the oil test was a good test of maturity, and was the best test available. In our opinion, the testimony on behalf of the defendants, under all of the circumstances, is more convincing and entitled to greater weight.

Dr. Harding (plaintiffs' witness) stated that an oil content test might make a satisfactory test of maturity, if the

[4] It was not explained how plaintiffs' witnesses surmounted the inherent difficulties of such a test. The oil test is ordinarily made when the fruit is hard. It ordinarily involves the destruction of the fruit. Even if only half of an individual avocado were tested, the other half would not ripen normally. If the oil test were made on soft fruit, it would not conform to the California test, and there would be a danger of a biased sampling of fruit. (That is, the test might be made only on fruit which had given physical indications during softening that it was mature.)

percentage required were set independently for different varieties. No physical test (or picking date test) is perfect, but this Court is convinced that the most satisfactory physical test for the maturity of avocados is some sort of oil content test.

Equitable Jurisdiction

A Court of equity has a certain discretion as to whether it should exercise its equitable jurisdiction in any particular case. Defendants argue that plaintiffs have made no showing of threatened irreparable damage to them, such as would justify the issuance of an injunction sus- [fol. 306] pending the enforcement of the laws of the State of California.[5] If the instant case were before this Court for the first time, the Court would decline to take equitable jurisdiction, on the showing made by plaintiffs (See: *Watson* vs. *Buck*, 313 U.S. 387; *A.F. of L.* vs. *Watson*, 327 U.S. 582).

If the Court were required to take equitable jurisdiction of the instant case, coming before this Court for the first time, it might well be advisable for the Court to retain jurisdiction of the case, pending an authoritative interpretation of the California law by the California Courts, which might be expected to result from the declaratory judgment proceeding which defendants have now brought against plaintiffs in the Superior Court of the State of California, in and for the County of Sacramento.[6] (See: *A.F. of L.* vs. *Watson, supra.*)

This case is now before this Court, however, with a mandate from the United States Supreme Court, directing this Court to conduct further proceedings consistent with the opinion of the Supreme Court. In that opinion, it is stated that plaintiffs herein are entitled to have this controversy decided upon the merits. This Court concludes, therefore, that in the instant case this Court has no dis-

[5] For some discussion of the delicacy of the exercise of such equitable power, see the material in footnote 5 of *Florida Lime & Avocado Growers* vs. *Jacobsen, supra*, at 362 U.S. 77.

[6] Case No. 125826, in the records of that Court.

cretion to decline equitable jurisdiction or to retain jurisdiction while awaiting State Court decision.

[fol. 307] The Merits of the Controversy

In the remainder of this opinion, we will consider, first, the Constitutional validity of the California law (A) in relation to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and (B) in relation to the Commerce Clause of the Federal Constitution. Then we will consider the question of whether the California law is in conflict with Federal laws or regulations.

In considering these questions, one must bear in mind that the burden of proof is upon plaintiffs herein to establish all the elements of their case by a preponderance of the evidence (31 C.J.S. pp. 713-714; *O'Brien* vs. *Equitable Society*, 212 F.2d 383; and See: *United States* vs. *Denver & R. G. Ry. Co.*, 191 U.S. 84; *Northern P. Ry. Co.* vs. *Lewis*, 162 U.S. 366; and *Morse* vs. *Fields*, 127 F.Supp. 63).

Moreover, in discussing Due Process limitations on the legislative power of the State of California, it must be noted that it is not enough for plaintiffs simply to establish that the legislation in question is out of harmony with a particular school of thought (*Williamson* vs. *Lee Optical Co.*, 348 U.S. 483). They must go beyond that. If it should be found that there is a respectable body of opinion in the light of which the enactment is reasonable, then it is for the Legislature, not this Court, to hold the balance between two conflicting schools of thought, and to decide which of them preponderates.

Constitutionality of the California Law

A. Equal Protection

Plaintiffs contend that the California 8% oil content [fol. 308] test is arbitrary and unreasonable, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The Equal Protection Clause does not require perfection in legislative classification (See: *Phillips Chemical Co.* vs. *Dumas School District*, 361 U.S. 376). It is not enough

that a classification by State law is discriminatory; it must be arbitrary and unreasonable before the Equal Protection Clause may be invoked to strike it down (*Allied Stores of Ohio* vs. *Bowers*, 358 U.S. 522 and *Borden's Co.* vs. *Ten Eyck*, 297 U.S. 251). It is for the Legislature, not the Courts, to write the laws. The people, if the Legislature commits abuses, have their remedy at the polls (*Williamson* vs. *Lee Optical Co., supra*).

It must be conceded that the 8% oil content requirement has worked effectively to bar immature avocados from the California markets. It is clearly established that an oil content test is the best available physical test for maturity. The only real issue is whether California must establish different percentages of required oil content for different kinds of avocados. There are hundreds of varieties of avocados. If each is to have its own required oil content, it is almost inevitable that the regulation must in time come under the control of the producers. The California Legislature cannot be expected to establish, after considered deliberation, hundreds of standards. If two or three categories are established, it will not always be an easy matter to decide in which category a particular variety may belong. These difficulties offer reasonable support for the [fol. 309] decision of the State of California to enact a single uniform standard. This is perfectly proper for "not only the final purpose of the law must be considered, but the means of its administration" (*St. John* vs. *New York*, 201 U.S. 633).

The police powers of California might reasonably be applied to insure a minimum oil content of the avocados for the sake of the higher nutritional value of the avocado, even if there were no issue of the maturity of the fruit. Legislation imposing a minimum butterfat content requirement on milk sold for human consumption has been customary in this country for many years (See: *St. John* vs. *New York, supra*). Such legislation disregards the fact that different breeds of cattle naturally produce different amounts of butterfat in their milk. It imposes a uniform requirement on all milk sold for human consumption, whether from Jersey or Holstein cows. There is no good reason why a similar requirement cannot be imposed on all

avocados sold for human consumption. The general consuming public has traditionally given best acceptance to the richer kinds of milk. A requirement of similar richness for avocados would appear to be reasonable.[7]

Granting the possibility of a better law than the one devised by the California Legislative authorities, that does [fol. 310] not require a finding that the law which *has* been passed is unconstitutional. The test is whether it is unreasonable and arbitrary. We hold that it is not.

B. Interstate Commerce

It is patent that the California law is designed to prevent the marketing of immature avocados for human consumption in California. Such an enactment is not automatically invalidated because some of the avocados in question move into the State in interstate commerce (See: *Milk Board* vs. *Eisenberg Co.*, 306 U.S. 346; *Simpson* vs. *Shepard*, 230 U.S. 352). It is competent for a state to adopt protective measures for the health, safety, morals and welfare of its people, although interstate commerce may incidentally be involved (*Simpson* vs. *Shepard, supra; Mintz* vs. *Baldwin*, 289 U.S. 346). State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause (*Huron Cement Co.* vs. *Detroit*, 362 U.S. 440).

The question of whether the California law discriminates against interstate commerce is more difficult. It is clearly established that the law complained of was passed for a valid police purpose, without thought at the time of its passage of discriminating against Florida avocados. Florida avocados were of no commercial importance at the time that California adopted the 8% oil content requirement. It is admitted that there is no discrimination in the enforcement of the law. The only question is whether the

[7] The State of California, which imposes the 8% oil content requirement, seems to have extremely good consumer acceptance of avocados. In 1955-1956, with less than a tenth of the Nation's population, the people of California consumed approximately half of the avocados consumed in the United States. This may be due to other factors than the fact that California consumers can rely on getting 8% oil. But it may be largely due to that fact.

[fol. 311] 8% oil content requirement is inherently discriminatory against interstate commerce in the circumstances which now exist.

Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% requirement. These are the West Indian varieties. The bulk of West Indian avocados grown in Florida are Waldins, which do attain 8% oil content, but are practically unmarketable at that time. The West Indian avocados, however, are difficult to market in distant states at any stage in their development, due to poor shipping qualities and short shelf life. Interference with the marketing of West Indian avocados in California is, for all practical purposes, within the maxim of *de minimis non curat lex.*

The West Indian varieties, actually, are discriminated against because of their qualities, not because they are shipped in interstate commerce. Avocados of the West Indian varieties are not as rich as the fruit of the varieties which do meet the 8% requirement. The application of the 8% requirement in California, ever since 1925, has naturally prevented the commercial development in this State of any varieties which cannot meet the requirement. As proof that there is no discrimination against interstate commerce as such, we see that the overwhelming majority of the shipments of avocados made by plaintiffs to this State have been marketed successfully after passing the California test.

Looking at the testimony of plaintiffs' witness, Dr. Harding, we see that the hybrid avocados may be "acceptable," but not necessarily in "prime condition," before they [fol. 312] reach the 8% oil requirement. Plaintiffs want to market them before they reach prime condition, in order to get the high prices which prevail at the start of the season. This is the very sort of practice which the California law was enacted to prevent. California producers may no longer jump the gun in this fashion. It is not discriminatory treatment, but equality of treatment, of which plaintiffs seem to complain.

We hold, then, that the California 8% oil requirement is not unconstitutional.

Alleged Conflict Between State and Federal Law

The remaining question for the Court is whether the California 8% oil requirement must give way in the face of Florida Avocado Order No. 69, which was issued under the authority of the Federal Agricultural Marketing Agreement Act of 1937.

The Federal law attempts to prevent the marketing of immature avocados by Florida producers by an application of the picking date method of determining maturity. The Federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they *may* market their avocados without further inspection by the states, if they comply with the shipping dates established by the Federal Order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms (See: Title 21 U.S.C. §121).

[fol. 313] The Federal law does not cover the whole field of interstate shipment of avocados. It would be lawful to raise avocados in Texas or Louisiana and ship them into California without complying with Florida Avocado Order No. 69, or any similar Federal order.[8] California avocados may be shipped to any state of the United States without complying with Florida Avocado Order No. 69, or any similar order.

California consumers are not given complete protection from the marketing of immature avocados by any Federal law or order. For all that the Federal law declares, avocados grown in any state but Florida may be sold in California without any standards designed to insure maturity. It is clear that insofar as California forbids the marketing of avocados with less than 8% oil content grown anywhere but in Florida, the California law is not in conflict with Federal law or regulations. Nor does it directly conflict with the explicit terms of such law or regulations, even when applied to Florida-grown avocados.

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[8] At present, no state of the United States, excepting Florida and California, raises avocados in significant quantity.

California has lawfully applied an 8% oil content test to avocados marketed by her own producers, which may be applied to any state not covered by the Federal Order. If the implication of Federal pre-emption of the field is read into Florida Avocado Order No. 69 and the Act under which it was issued, Florida producers alone will be privileged to avoid compliance with that test. Such an implication [fol. 314] should not lightly be made (*Cloverleaf Co.* vs. *Patterson*, 315 U.S. 148). Congress, not having covered the whole field of interstate transportation of avocados, has left a wide field for the protection of consumers by the states by the appropriate exercise of the state police power (See: *Reid* vs. *Colorado*, 187 U.S. 137). The case would be different if the Federal Government had established a complete and uniform regulatory scheme which covered the whole problem (See: *Oreg.-Washington Co.* vs. *Washington*, 270 U.S. 87), but this the Congress has not done.

Plaintiffs derive some comfort from the case of *Mintz* vs. *Baldwin, supra*. In that case, the granting of a Federal certificate would have prevented the application of state inspection requirements, only because the Federal law there interpreted expressly so stated.

In *Cloverleaf Co.* vs. *Patterson, supra*, it was declared that where a Federal statute does not in specific terms prohibit state action, it must be clear that the Federal provisions are inconsistent with those of the state, before prohibition of state action may be inferred. It was further held that the Federal Government had established its own exclusive regulation of the manufacture of the product there involved, to the exclusion of state regulation of such manufacture. However, it was stated that if the finished product were offered for sale in a state, it would be subject to the pure food laws of that state. To infer that the California 8% oil content requirement is not applicable to Florida avocados because of Florida Avocado Order No. 69, this Court would be required to overrule *Cloverleaf Co.* vs. *Patterson, supra*. This, the Court has neither [fol. 315] the power nor the inclination to do.

Both the State and the Federal requirements may be, and are being, enforced, without any clash between the two authorities. We are enjoined by the highest authority

against seeking out conflict between state and Federal regulation, unless such conflict clearly exists (*Huron Cement Co.* vs. *Detroit, supra*).

We conclude that plaintiffs cannot prevail in this case, upon the merits thereof. The California law which plaintiffs have called in question is not in conflict with any provision of the United States Constitution, or with any Federal law or regulation.

It Is, Therefore, Ordered that plaintiffs take nothing by this action, and that judgment herein be, and it is, rendered against plaintiffs and in favor of the defendants.

And It Is Further Ordered that defendants prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum and order, and lodge them with the Clerk of this Court pursuant to the applicable rules and statutes.

Dated: July 10th, 1961.

Homer T. Bone, Senior Judge, United States Court of Appeals for the Ninth Circuit.

Louis Goodman, Chief Judge, United States District Court for the Northern District of California.

Sherrill Halbert, United States District Judge.

[fol. 316] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

PLAINTIFFS' OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, RULINGS ON EVIDENCE AND JUDGMENT ORDER—Filed August 4, 1961

I.

Objections to proposed findings of fact

Proposed finding No. 1: Fails to state that plaintiff Florida Lime and Avocado Growers, Inc., incorporated as a corporation for profit April 6, 1956, is the continuation of the same business previously conducted as a cooperative.

Proposed finding No. 4: There is no basis in the evidence for impliedly imputing to plaintiffs a temptation to pick and market avocados in an immature state; also, it is misleading to suggest that there is a universal growing season for all avocados, no matter of what varieties or where grown.

[fol. 317] *Proposed finding No. 5*: There is no substantial evidence to support the statement that oil content is the best available index of the maturity of avocados, if intended to apply to the Florida-grown avocados handled by plaintiffs.

Proposed finding No. 6: There is no substantial evidence to support the proposed finding that a standard requiring a minimum of 8% of oil in an avocado before it is marketed is scientifically valid as a criterion of maturity or quality of the hybrid and Guatemalan varieties of avocados grown in Florida.

Proposed finding No. 8: There is no substantial evidence that the West Indian varieties of avocados grown in Flor-

ida are of declining commercial importance, nor evidence that the lower volume of Florida shipments of West Indian avocados in the 1959-60 season as compared with the 1955-56 season was attributable to declining commercial importance of these avocados rather than to the difference in the growing and marketing conditions prevailing in the two seasons.

Proposed finding No. 9: Comparison of the volume of shipments of hybrid and Guatemalan varieties of avocados made from Florida in the 1959-60 season, as against the volume of shipments of West Indian varieties of avocados made in this particular season, with no evidence whatever of the growing conditions affecting the production of the different varieties in this particular season, does not warrant the conclusion that the hybrid and Guatemalan varieties are of relatively increasing commercial importance in comparison with the West Indian varieties.

Proposed finding No. 10: There is no substantial evidence that under present-day methods and facilities of transportation and storage it would not be commercially feasible to market in California West Indian varieties of avocados grown in Florida if not debarred by the California 8% oil content requirement.

[fol. 318] *Proposed finding No. 11*: The effect of the California 8% oil content in application to avocados grown in California is not a matter within the issues of this case; the proposed finding, in application to the hybrid and Guatemalan varieties of avocados grown in Florida, as well as the West Indian varieties, is contrary to the overwhelming evidence that the California 8% oil content requirement impedes or debars the marketing of these varieties in this state after they have attained maturity, even though they have not also attained 8% oil content.

Proposed finding No. 12: In the absence of any evidence whatever regarding the conditions affecting the growing and marketing of Florida avocados in the years 1959, 1960 and 1961, the fact that the plaintiffs did not market or attempt to market any avocados in California during these years is immaterial to the issues of this case.

Proposed finding No. 13: Contrary to the conclusion stated in this proposed finding, the evidence shows abundantly that the plaintiffs have suffered irreparable injury because of the California embargo against sale in this state of mature and wholesome Florida avocados with less than 8% oil content.

II.

Objections to proposed conclusions of law

Proposed conclusions Nos. 3, 4, 5, 6 and 7: The plaintiffs object to these proposed conclusions of law, or of mixed law and fact, as contrary to the evidence and the law applicable thereto.

III.

Objections to proposed rulings on evidence

1. The court has already ordered the substitution of Charles Paul as defendant in place of William E. Warne, as indicated by the amended title of the case in the court's memorandum and order filed July 12, 1961 and the footnote on page 1 thereof.

[fol. 319] 2 and 3. There is no basis in the record for the assertion that all of plaintiffs' depositions and exhibits were either submitted to the court as an "offer of proof," or received or considered by the court as an offer or offers of proof. Instead, the record shows that said depositions and exhibits were offered and received in evidence, with leave to the defendants to submit objections thereto, such objections to be passed upon by the court if deemed necessary. (Tr. 191: "They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if it is necessary.") Thereupon, in its order and memorandum of July 12, 1961, the court declared that a ruling or rulings on defendants' objections to the admissibility of plaintiffs' evidence, in whole or in part, was deemed unnecessary.

4. A reservation of right to the defendants to introduce certain evidence upon a further hearing of the case, in the

event of a remand of the case for further hearing by the court to which an appeal is taken from the judgment of this court, would be a procedural anomaly.

5. There is no occasion to enter an order at this time receiving into evidence exhibits offered by the defendants upon the trial of the case and then admitted without objection.

Wherefore the plaintiffs submit that no orders or rulings should be made by the court as requested by the defendants in the document entitled "Order *re* plaintiffs' motion to substitute and ruling on evidentiary matters."

Respectfully submitted,

Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 320] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

DEFENDANTS' REPLY TO PLAINTIFFS' OBJECTIONS TO PROPOSED FINDINGS—Filed August 7, 1961

Findings of Fact

1. Proposed Finding No. 1:

This finding is based on the stipulation of counsel, filed with the Court on April 26, 1961.

2. Proposed Finding No. 4:

This finding follows the memorandum opinion of the Court page 4, and is supported in the transcript of testimony pages 162-163.

3. Proposed Finding No. 5:

This finding that oil is the best available index of maturity for avocados follows the memorandum opinion of the Court [fol. 321] page 7, and is supported by the transcript of testimony pages 65, 108, 136.

4. Proposed Finding No. 6:

The finding that a standard requiring a minimum of 8% in oil in an avocado is scientifically valid as applied to hybrid and Guatemalan varieties follows the memorandum opinion of the Court, pages 6 and 7, and is supported by the transcript of testimony pages 46, 137, 164.

5. Proposed Finding No. 8:

The finding that the West Indian varieties of avocados grown in Florida are of declining importance is based on the record of commercial shipments by volume and variety set forth in defendants' exhibit E (admitted into evidence, Tr. 130).

6. Proposed Finding No. 9:

The finding that the hybrid and Guatemalan varieties are of increasing commercial importance is based on the record of commercial shipments by volume and variety set forth in defendants' exhibit E (admitted in evidence, Tr. 130).

7. Proposed Finding No. 10:

The finding follows the memorandum opinion of the Court, page 13, and is supported by the transcript of testimony pages 164-165; 177-179.

8. Proposed Finding No. 11:

The finding follows the memorandum opinion of the Court pages 10 and 11, and is supported by the transcript of testimony pages 111-112, 158, 164.

9. Proposed Finding No. 12:

The finding is supported by the plaintiffs' answers to interrogatories set forth in defendants' exhibits A, B, C, D (admitted in evidence, Tr. 129). The finding is relevant [fol. 322] to show the absence of injury to plaintiffs.

10. Proposed Finding No. 13:

The finding follows the memorandum opinion of the Court, pages 6 and 13, and is supported by the absence of proof by plaintiffs of injury.

Order Re Motion to Substitute and Ruling on Evidentiary Matters

1. The proposed order substituting Charles Paul in the place of William E. Warne as a party defendant follows the direction of the Court to prepare "all other documents necessary for the full and complete disposition of the case . . . . " Memorandum Opinion herein, filed July 12, 1961, pages 1 and 17.

2. The proposed order that the depositions of Biggars, Harkness, Kendall, Piowaty and Wimbish, and the exhibits attached thereto were considered by the Court as an offer of proof follows the memorandum opinion of the Court, page 3, which held these documents admissible *arguendo* only. Plaintiffs' rights are fully protected since the contents of the depositions and exhibits, as offers of proof, will be available for review by an appellate court.

At the trial plaintiffs offered into evidence in their entirety (and without reading) the 305 page transcript of depositions taken earlier in Florida, together with the voluminous exhibits attached thereto. Tr. 29. Defendants promptly objected to their admission in evidence and requested that they be read in order that appropriate objection could be entered statement by statement and witness by witness. Tr. 29. The Court thereupon reserved ruling on their admissibility pending the filing of defendants' detailed objections. Tr. 29, 103, 190-191. During the course of the proceedings thereafter the Court treated these depo-

[fol. 323] sitions and exhibits as having constituted an offer of proof

> "They have been *offered* in evidence but we have reserved the ruling on them." Tr. 103. (emphasis added)
>
> ". . . we may dispose of this case without any need of acting upon objections to the depositions. We are not going to consider that unless it is necessary. If it is necessary then we will have to have another hearing." Tr. 190.

The latter statement "They are all in evidence subject to your objections . . . . " (Tr. 191) when considered in the light of the earlier statements show that the question of the admissibility of the depositions and exhibits was reserved for later decision of the Court.

As noted above, the Court considered the contents of the depositions and exhibits as an offer of proof. Finding the offer of proof lacking in solidity, the Court had no need to reconvene to consider their admissibility under the rules of evidence.

The alternative proposed by plaintiffs is untenable. The admission of these depositions and exhibits into evidence, without the hearing of defendants' evidentiary objections, and without affording the defendants opportunity to adduce rebutting evidence, would be error. *Los Angeles D. & Mtg. Exch.* v. *Securities & E. Comm.*, 9 Cir., 264 F.2d 199 (1959).

Dated:

Respectfully submitted,

Stanley Mosk, Attorney General, State of California,
John Fourt, Deputy Attorney General, State of California.

[fol. 324] Affidavit of Service by mail (omitted in printing).

[fol. 325] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER OVERRULING PLAINTIFFS' OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, RULINGS ON EVIDENCE, AND JUDGMENT ORDER—September 20, 1961

Plaintiffs' objections to the defendants' proposed findings of fact, conclusions of law, rulings on evidence and judgment order, and the memoranda submitted in connection with said objections, have been duly considered by the Court and found to be without merit.

It Is, Therefore, Ordered that plaintiffs' objections to [fol. 326] defendants' proposed findings of fact, conclusions of law, rulings on evidence and judgment order be, and the same are, hereby overruled.

Dated: September 20, 1961.

Homer T. Bone, Senior Judge, United States Court of Appeals for the Ninth Circuit; * *See Note Below*, Chief Judge, United States District Court for the Northern District of California; Sherrill Halbert, United States District Judge, Northern District of California.

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Order.

[fol. 327] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
September 20, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision, makes the following findings of fact and conclusions of law in accordance with its memorandum opinion filed July 12, 1961.

[fol. 328] Findings of Fact

1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.

2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney

General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high.

5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it [fol. 329] can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season.

9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California, even in the absence of the California 8% oil content statute.

11. The California 8% oil content requirement is ef- [fol. 330] fective in keeping off the market immature avocados of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit.

12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Growers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

13. Plaintiffs have neither suffered nor been threatened with irreparable injury.

Conclusions of Law

1. This action seeks to enjoin the enforcement of a state law upon the ground of unconstitutionality and plain-

tiffs' application for such an injunction was properly heard before this three judge court under 28 U.S.C. 2281.

2. The Court has jurisdiction of the subject matter of this suit and of the parties.

3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this Court.

4. Section 792, California Agricultural Code, is consistent with the federal Agricultural Marketing Agreement Act of 1937, and with the marketing regulations for avoca- [fol. 331] dos grown in South Florida issued by the Secretary of Agriculture thereunder.

5. Section 792, California Agricultural Code, is consistent with the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, and with the equal protection clause of Section 1 of the Fourteenth Amendment thereto.

6. That the enforcement of Section 792, California Agricultural Code, and the regulations promulgated pursuant thereto against plaintiffs, are constitutional and valid.

7. Defendants are entitled to judgment that plaintiffs take nothing; that plaintiffs' request for injunction be denied; that the action be dismissed on the merits; and that the defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Judgment is hereby Ordered to be entered accordingly.

Dated: September 20, 1961.

Homer T. Bone, United States Circuit Judge; * *See Note Below*, United States District Judge; Sherrill Halbert, United States District Judge.

Disapproved and objections submitted.

Isaac E. Ferguson, Attorney for plaintiffs.

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* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign these Findings of Fact and Conclusions of Law.

[fol. 332] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER RE PLAINTIFFS' MOTION TO SUBSTITUTE AND RULING ON EVIDENTIARY MATTERS—Filed September 21, 1961

The above entitled action came on for trial on February 7 and 8, 1961, on the application of plaintiffs for permanent injunction, and the Court having reserved ruling on certain motions and evidentiary matters at the trial pending the filing of written argument of the parties, and written argument having been duly filed and considered by the Court, and the Court being fully advised, now therefore it is Ordered:

1. Charles Paul, Director of Agriculture of the State [fol. 333] of California, is substituted as a party defendant in the place of William E. Warne;

2. The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, are not admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;

3. Plaintiffs' exhibits for identification 1 through 26, are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs;

4. The Court reserves to defendants the right to introduce rebutting evidence at a further hearing should it be determined upon appeal and remand that the plaintiffs' offer of proof described in paragraphs 2 and 3 herein should have been admitted into evidence;

5. Defendants' exhibits A, B, C, D, E and F are admitted into evidence, plaintiffs having raised no objection thereto.

Dated: September 20, 1961

Homer T. Bone, United States Circuit Judge; * *See Note Below*, United States District Judge; Sherrill Halbert, United States District Judge.

Disapproved and objections submitted.

Isaac E. Ferguson, Attorney for Plaintiffs.

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* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Order.

[fol. 334] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; Edmund G. Brown, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California, Defendants.

JUDGMENT—Entered September 22, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision and the Court having heretofore made and caused to be filed herein its written

findings of fact and conclusions of law and being fully advised, it is Ordered:

1. Plaintiffs take nothing;

[fol. 335] 2. Plaintiffs' request for permanent injunction is denied;

3. The action is dismissed on the merits;

4. Defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Dated: September 20, 1961.

Homer T. Bone, United States Circuit Judge; * *See Note Below,* United States District Judge; Sherrill Halbert, United States District Judge.

Entered in Civil Docket Sept. 22, 1961.

Disapproved.

Isaac E. Ferguson, Attorney for plaintiffs.

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* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Judgment.

[fol. 339] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER THAT CERTAIN ORIGINAL RECORDS BE INCLUDED IN APPEAL RECORD—October 3, 1961

It is hereby ordered, upon stipulation of counsel for the respective parties in the above-entitled cause, that upon the filing herein within the time permitted by law of a notice of appeal to the Supreme Court of the United States

from the judgment entered herein on September 22, 1961, and upon designation by the parties of the documents and papers to be included in the record on such appeal, that the clerk of this court shall transmit to the clerk of the United States Supreme Court as part of such record the originals, in lieu of copies, of all depositions and exhibits that may be designated by the parties.

Dated: October 3, 1961.

Sherrill Halbert, United States District Judge.

[fol. 340] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil action No. 7648

[Title omitted]

ANSWER OF CHARLES PAUL—Filed October 4, 1961

Comes now Charles Paul, Director of Agriculture, State of California, and with leave of court files his answer to plaintiffs' complaint as amended, and for cause of defense alleges as follows:

First Defense

That this answering defendant admits the allegations contained in paragraphs II, V, VIII, XI, XVII, XVIII, XIX, XX, and XXI of plaintiffs' complaint; that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VI, VII, IX, X, XII, XIII, XIV, XV, XXII, XXIV(a), XXV and XXVII of plaintiffs' complaint and [fol. 341] on said ground denies the truth of each and every allegation contained in said paragraphs; that this answering defendant denies the truth of each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV(b), XXVI, XXVIII, XXIX, XXX, XXXI and XXXII of plaintiffs' said complaint.

Second Defense

That plaintiffs' suit abated on January 3, 1961, the date when former defendant William E. Warne vacated the office of Director of Agriculture, State of California; that the court prejudicially erred and acted in excess of its jurisdiction in substituting this answering defendant in the place of the said William E. Warne.

Third Defense

That this court lacks jurisdiction for failure of the complaint to allege facts showing the existence of a case or controversy within Constitution, Article III.

Fourth Defense

That this court lacks jurisdiction over the subject matter set forth in the complaint.

Fifth Defense

That the complaint fails to state a case within the equity jurisdiction of the court.

Sixth Defense

That the complaint fails to state a claim against defendant upon which relief can be granted.

[fol. 342]

Seventh Defense

That the federal constitutional questions raised by the pleadings may be avoided or simplified or their posture changed if the state enactments in question are first construed by the authoritative decision of a California court; that this court should stay further proceedings pending an authoritative determination of doubtful state law in the state courts of California.

Eighth Defense

That the quality and maturity standards purportedly promulgated under Marketing Order No. 69, governing avocados grown in South Florida (19 F.R. 3439, 7 C.F.R. 969), the promulgation, and the methods and procedures used in the administration thereof, are unreasonable and arbitrary and are invalid in that they fail to comply with the requirements of the Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 et seq.).

Ninth Defense

That sections 784 and 792, California Agricultural Code, constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing of immature, unwholesome avocados, thus maintaining the industry reputation, and consumer and trade market demand, for mature, wholesome, nutritious avocados.

[fol. 343] Wherefore, defendant prays:

1. That the plaintiffs' said complaint be dismissed;

2. That sections 784 and 792, California Agricultural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, delivered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California;

3. That the defendant be granted such other relief in the premises as the court may deem just and proper;

4. That the court award to defendant his costs.

Dated: October 4, 1961

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendant. Charles Paul, Director of Agriculture, William Norris, Of Counsel.

[fol. 344] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

[fol. 345] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

NOTICE OF APPEAL—Filed October 10, 1961

Notice is hereby given that Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., the above named plaintiffs, hereby appeal to the Supreme Court of the United States from the final judgment entered September 22, 1961, that plaintiffs take nothing, denying plaintiffs' request for permanent injunction, dismissing the action on the merits, and that the defendants recover from plaintiffs their costs of action.

This appeal is taken pursuant to 28 U.S.C. section 1253.

Appellants' designation of record on appeal

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 346] Court of the United States, and include therein the following:

1. All portions of the record heretofore transmitted to the Clerk of the Supreme Court of the United States on plaintiffs' appeal (pursuant to notice of appeal filed February 12, 1959) from the judgment entered January 13, 1959.

2. Judgment of U.S. Supreme Court reversing judgment of District Court, filed April 25, 1960.

3. Motion of plaintiffs to amend and supplement complaint, etc., filed April 29, 1960.

4. Special appearance of defendants Edmund G. Brown and Stanley Mosk in opposition to plaintiffs' motion to amend complaint, filed May 5, 1960.

5. Special appearance of defendant William E. Warne in opposition to plaintiffs' motion to amend complaint, filed May 5, 1960.

6. Plaintiffs' reply to defendants' memorandum on motion to substitute parties, filed May 16, 1960.

7. Order June 6, 1960, granting plaintiffs' motion to substitute parties, filed June 6, 1960.

8. Amendment and supplement to plaintiffs' complaint, filed June 6, 1960.

9. Order granting leave to plaintiffs to amend and supplement complaint, filed June 13, 1960.

10. Amendment and supplement to plaintiffs' complaint, filed June 13, 1960.

11. Order granting leave to defendants to file answers, filed June 14, 1960.

12. Answer of defendant William E. Warne, filed June 14, 1960.

13. Answer of defendants Edmund G. Brown and Stanley Mosk, filed June 14, 1960.

14. Defendants' interrogatories to George Norris and the answers thereto, filed August 19, 1960.

15. Answers of plaintiffs to defendants' interrogatories, filed October 10, 1960.

[fol. 347] 16. Motion of plaintiffs for leave to substitute James T. Ralph as defendant in place of William E. Warne, filed January 27, 1961.

17. Motion of plaintiffs for leave to substitute Charles Paul as defendant in place of William E. Warne, filed February 6, 1961.

18. Memorandum of defendants *re* substitution of state officers, filed February 7, 1961.

19. Trial proceedings February 7 and 8, 1961, including reporter's transcript of oral testimony, plaintiffs' exhibits 23, 24, 25 and 26, and defendants' exhibits A, B, C, D, E and F (for identification).

20. Amended motion of plaintiffs for substitution of Charles Paul as defendant in place of William E. Warne, filed March 9, 1961.

21. Order March 13, 1961 correcting clerical mistake.

22. Stipulation *re* exhibits, filed April 26, 1961.

23. Special appearance of Charles Paul in opposition to plaintiffs' motion to substitute Charles Paul as defendant in place of William E. Warne, filed April 26, 1961.

24. Stipulation *re* plaintiff corporations, filed April 26, 1961.

25. Memorandum and order filed July 12, 1961.

26. Plaintiffs' objections to proposed findings, etc., filed August 4, 1961.

27. Reply to plaintiffs' objections to proposed findings, etc., filed August 7, 1961.

28. Lodged defendants' proposed findings, etc., August 10, 1961.

29. Order September 21, 1961 overruling plaintiffs' objections to proposed findings, conclusions, judgment, etc.

30. Findings of fact, conclusions of law, ruling on evidentiary matters and judgment, filed September 21, 1961.

31. Entry of judgment, September 22, 1961.

32. Order October 3, 1961 staying judgment pending appeal.

[fol. 348] 33. Order October 3, 1961 directing clerk to transmit originals of depositions and exhibits on plaintiffs' appeal.

34. Answer of Charles Paul to plaintiffs' complaint as amended, filed October 4, 1961.

35. Plaintiffs' notice of appeal and designation of record on appeal.

The questions presented by this appeal and the circumstances under which they arise.

(1)

Does not the commerce clause of the United States Constitution (Art. I, Sec. 8, clause 3), of its own force and without implementation by acts of Congress, preclude inhibition against sale in California of avocados grown in Florida and shipped in interstate commerce, on the ground that said avocados have less than the 8% oil content demanded by Sec. 792 of the Agricultural Code of California, even though said avocados by their nature mature with less than 8% oil content and are not for that reason deleterious, unpalatable, or of inferior quality?

(2)

In practical effect, does not the application of Sec. 792 of the Agricultural Code of California to avocados produced in Florida and shipped for sale in California result in arbitrary discrimination against the Florida fruit, to the competitive commercial advantage of the growers and handlers of California avocados, since the avocados produced in Florida are predominantly of varieties that of their nature and conditions of growth attain maturity and maximal quality with less than 8% oil content, while the avocados produced in California are predominantly of varieties with much higher oil content, and since the lower oil content of the Florida avocados does not of itself render the fruit unpalatable or inimical to health, thus denying to the shippers of the Florida fruit the equal protection of the law commanded by the Fourteenth Amendment?

[fol. 349] (3)

In face of the supremacy clause of the United States Constitution (Art. VI, Sec. 2), may officers of the State of California debar from sale in that state avocados grown in Florida and shipped in interstate commerce in compliance with the maturity and quality regulations issued by the Secretary of Agriculture of the United States pursuant to authority vested in him by Congress in the Agricultural

Marketing Agreement Act of 1937, by disregarding the federal certification of such avocados as of requisite maturity and quality for interstate marketing and instead subjecting such avocados to another and different determination of maturity and quality prescribed by state law?

* * * * * * *

Appellants, handlers of avocados grown in South Florida, have been frustrated in their endeavors to avail themselves of the market for their fruit in California by imposition of California's 8% oil content requirement for sale of avocados in that state. Of the 40-odd varieties of avocados produced commercially in Florida, some never attain 8% oil content, while the remaining varieties attain 8%, if ever, only long after they reach maturity and are ready to be marketed.

There is not an iota of evidence in the case that the low oil content of the Florida avocados is of itself indicative of immaturity, unpalatability or unwholesomeness, in particular the avocados shipped by appellants to California and rejected for sale in that state because of failure to pass the 8% oil test. There is abundant evidence to the contrary.

Since June 11, 1954 the avocados of which appellants are handlers have been marketed in interstate commerce under a marketing agreement and order made by the Secretary of Agriculture of the United States pursuant to authority vested in him by Congress in the Agricultural Marketing Agreement Act of 1937. The specific purpose for which [fol. 350] this particular marketing agreement was made was to establish standards of maturity and quality to govern the interstate marketing of this fruit, thereby to promote market acceptance and to stabilize the return to the growers. Oil content is not a determinant of maturity or quality of the Florida avocados under the marketing agreement. Instead, as to each of the different varieties of the fruit, maturity is determined by attainment of specified weight (or size) at the permissible picking dates assigned for the particular variety. These picking dates vary from season to season in accordance with the growing conditions affecting the crop as a whole, or affecting particular varieties. For each variety, in each crop season, three or four successive picking dates are assigned, about

two weeks apart, and at each of these dates the avocados which have attained the specified minimum weight are permitted to be picked. At each of the permissive picking dates the minimum weight requirement is somewhat reduced, until finally the minimum weight requirement is lifted entirely.

Manifestly, the California 8% oil content requirement, as a determinant of maturity or quality of the Florida avocados shipped for sale in that state in compliance with the federal regulations, is in direct and irreconcilable conflict with the federal regulations, therefore must yield thereto.

Isaac E. Ferguson, Attorney for Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., Appellants, 13016 Victory Boulevard, North Hollywood, California.

[fol. 351] Proof of Service (omitted in printing).

[fol. 359] [File endorsement omitted]

In United States District Court
Northern District of California

Northern Division

Civil No. 7648

[Title omitted]

Notice of Cross-Appeal to the Supreme Court of the United States—Filed November 3, 1961

I. Notice is hereby given that Charles Paul, Edmund G. Brown and Stanley Mosk, defendants above-named, hereby cross-appeal to the Supreme Court of the United States as follows:

(1) From that portion of the Judgment entered herein September 22, 1961, which provides:

"3. The action is dismissed on the merits;"

This cross-appeal is taken pursuant to 28 U.S.C., section 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 360] Court of the United States, and include in said transcript the items described in defendants' cross-designation of record on appeal, filed herewith.

III. The following questions are presented on this appeal:

(1) Whether the District Court erred in dismissing the action on the merits instead of dismissing the action for want of equity jurisdiction.

(2) Whether the District Court erred in failing to dismiss the action as barred by the Eleventh Amendment to the United States Constitution.

(3) Whether appellants' evidence shows the existence of a case or controversy within Article III of the United States Constitution.

(4) Whether the District Court erred in failing to abstain from final decision pending construction of Section 792, Agricultural Code, by the California courts.

Dated: November 3, 1961.

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, Lawrence E. Doxsee, Deputy Attorney General, By: John Fourt.

[fol. 361] Affidavit of Service by Mail (omitted in printing).

[fol. 362]

SUPREME COURT OF THE UNITED STATES

No. 557—October Term, 1961

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., Appellants,

vs.

CHARLES PAUL, Director of Department of Agriculture of California, et al.

ORDER NOTING PROBABLE JURISDICTION—January 15, 1962

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

[fol. 363]

SUPREME COURT OF THE UNITED STATES

No. 599—October Term, 1961

CHARLES PAUL, Director of Department of Agriculture of California, et al., Appellants,

vs.

FLORIDA LIME AND AVOCADO GROWERS, INC., et al.

ORDER NOTING PROBABLE JURISDICTION—January 15, 1962

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary calendar and set for argument immediately following No. 557.